91-1782 (1)

No. 91-_____

Supreme Court, U.S.
FILED
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

PAUL DELO,

Petitioner,

vs.

LARRY GRIFFIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER ABUSE OF THE WRIT UNDER 28 U.S.C. § 2254, RULE 9(b) IS EXCUSED WHEN A HABEAS PETITIONER ALLEGES, IN A PETITION FOR REHEARING TO THE COURT OF APPEALS, THAT PREVIOUS HABEAS COUNSEL "MAY NOT" HAVE PRESENTED CLAIMS OF CONSTITUTIONAL DIMENSION THAT "MAY HAVE" MERIT TO THE DISTRICT COURT, WITHOUT ALLEGING CAUSE AS REQUIRED BY McCLESKEY V. ZANT, 499 U.S. ___ (1991).

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TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The April 14, 1992 panel opinion of the United States Court of Appeals remanding the petition for writ of habe-

as corpus is published in the Appendix at A-1. The February 3, 1992 panel opinion of the United States Court of Appeals remanding the petition for writ of habeas corpus is reported at 956 F.2d 167 (8th Cir. 1992), and published in the Appendix at A-7. The October 11, 1991 panel opinion affirming the district court's order denying respondent's petition for writ of habeas corpus is reported at 946 F.2d 1356 (8th Cir. 1991), and is published in the Appendix at A-12. The district court's order sustaining and adopting the magistrate's report and recommendation is not reported but is included in the Appendix (A-27). The magistrate's report and recommendation is not published, but is included in the Appendix (A-32).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its opinion on April 14, 1992. Pursuant to 28 U.S.C. §2201(c) and Supreme Court Rule 13.1, the present petition for writ of certiorari was required to be filed by petitioner within ninety days. Jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

REGULATORY PROVISIONS

28 U.S.C. §2254, Rule 9(b) provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits -or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

STATEMENT OF THE CASE

Respondent was convicted in the Circuit Court of St. Louis City of capital murder, §565.001, RSMo 1978 (repealed October 1, 1984), and was sentenced to death. The circumstances surrounding respondent's crime were summarized by the Missouri Supreme Court on direct appeal.

> Quintin Moss, a 19-year-old black male, lived with his parents in St. Louis. The record in this case leaves little room for doubt that he was involved in the illicit trafficking of drugs and that he plied his illegal trade near the intersection of Sarah and Olive Streets in St. Louis, six blocks from his parent's place of abode.
>
> Defendant, a black male, was the brother of Dennis Griffin. Reginald Griffin was the nephew of defendant

and Dennis. Prior to the killing of Quintin Moss, the defendant and Reginald lived together with defendant's sister.

In the early hours of January 2, 1980, Quintin Moss and Dennis Griffin arrived at the Moss apartment, awaking Mr. and Mrs. Moss by knocking on the door and ringing the doorbell. Following an argument between Quintin and his father, the latter objecting to his son's bringing "that kind of person home with him", Dennis departed the premises. A short time later he was killed in an alley behind the Moss apartment. About a week later Quintin Moss was arrested for this killing but subsequently released by the authorities. Thereafter, according to Mrs. Moss, she was the recipient of telephone threats

against her son's life because of the killing of Dennis Griffin. She opined the identified telephone caller was a "black male".

May 13, 1980: At about 2 or 2:15 in the afternoon, Quintin Moss and Robert Campbell, a black male, were together near the intersection of Sarah and Olive Streets. About 2:30 p.m. a black over brown older model Cadillac automobile, occupied by two black males, drove up and stopped. One of the occupants stepped out of the vehicle and fired four or five pistol shots in the direction of Quintin Moss and Robert Campbell, one bullet striking and wounding Campbell. The Cadillac, containing the two unidentified black males, then sped away. A short time later, Quintin Moss

was seen beneath his bicycle at the scene of the shooting.

Mrs. Moss was at her home when she saw her son ride up on his bicycle. Quintin was visibly disturbed and upset and explained that he had just been shot at and showed her a dent on his new bicycle. He asked his mother to take him back to the scene of the shooting and she did so.

At about 3:00 p.m., a police officer saw defendant and Reginald Griffin in a black over brown 1968 Cadillac automobile about three miles from the shooting. Reginald was driving the vehicle. When the officer, driving an unmarked police car, pulled up alongside the Cadillac and displayed his badge, the Cadillac accelerated and

drove away. A chase ensued for some distance before the police officer's car and another detective's car forced the Cadillac to a stop. Reginald Griffin was arrested for multiple traffic violations. No weapons were found.

June 26, 1980: Officer Jones, off duty at the time, was driving past 3656 Cook Street at about 4:00 p.m. He saw three black males near the house. He recognized defendant (known to be a police character), a second person wearing a red and white baseball cap, and a third person carrying what appeared to the officer to be a shotgun. Because of heavy traffic, Officer Jones was delayed in circling the block to investigate what he had observed. By the time he

returned, the three men had disappeared.

State's witness, Robert Fitzgerald, a white male, was standing beside his car about 4:30 p.m. near the intersection of Sarah and Olive Streets while two other men were attempting to repair it. Fitzgerald had earlier observed Quintin Moss in the vicinity and concluded Moss was engaged in selling narcotics. Moss was standing on the sidewalk near Fitzgerald's car when Fitzgerald saw a faded blue 1967 or 1968 Chevrolet drive up and stop behind his car. There were two black males in the front seat and a third in the rear seat. There was a burst of gunfire from the Chevrolet and Fitzgerald saw the defendant firing a pistol through the open window of the

passenger side of the front seat of the car. The person in the rear seat was firing a semi-automatic rifle. The direction of the shots was towards Moss and he was struck thirteen times by bullets. A passerby, Wallace Connors, was struck in the buttocks by one of the bullets. Fitzgerald had an unobstructed view of the defendant throughout the shooting and as the Chevrolet drove away. Fitzgerald saw the license plate on the rear of the car and memorized the number. He provided this information to the police and accompanied the officers to the police station where he identified defendant from a group of photographs as being the person firing the pistol from the front seat of the Chevrolet. A short time later

Fitzgerald identified the Chevrolet as the vehicle which had been at the scene of the killing.

The 1968 Chevrolet was parked behind an apartment building and was unoccupied. In the vehicle the officers found a .30 caliber semi-automatic rifle, which contained a clip containing seven live rounds of ammunition, empty rifle shell casings, a .38 caliber revolver, a red and white baseball cap, and a court receipt bearing the name "Reginald Griffin". When fully loaded the clip for the carbine would hold 31 rounds of ammunition. There was expert testimony that a bullet fragment found at the scene of the killing of Quintin Moss had been fired from the carbine, which

> Officer Jones testified was similar in appearance to the firearm one of the black males was carrying at the Cook Street address about 4:00 p.m. Officer Jones also testified the red and white cap was similar to the one he saw being worn by one of the two unidentified black males earlier. A .38 caliber bullet fragment found at the shooting scene was of the same general classification of the revolver found in the Chevrolet. Fitzgerald testified this revolver was similar to the one he saw defendant firing at Moss.

State v. Griffin, 662 S.W.2d 854 (Mo. banc 1983), cert. denied, 469 U.S. 873 (1984) (A-121). After respondent's conviction and sentence, respondent appealed to the Missouri Supreme Court alleging that there was prejudicial

error in the court's instructions to the jury and in admitting certain evidence in the guilt phase of his trial. Respondent also alleged prejudicial error was committed in the admission of evidence at the penalty stage of the trial and that the death penalty violates the federal constitution. The Missouri Supreme Court affirmed both the conviction and sentence. See State v. Griffin, supra.

Respondent also filed a post-conviction relief motion in the circuit court under former Missouri Supreme Court Rule 27.26 (repealed effective January 1, 1988). Upon denial of that motion, respondent appealed the circuit court's judgment to the Missouri Court of Appeals. In that appeal, respondent alleged that he received ineffective assistance of trial counsel because (1) trial counsel failed to interview and

call as a witness Robert Campbell; (2) trial counsel failed to offer mitigating evidence in the penalty phase of his trial; (3) trial counsel failed to file any pretrial motions relating to the death-qualification of the jury; and (4) trial counsel failed to make a timely objection to the testimony of Missouria Moss concerning the contents of phone calls she received. The Missouri Court of Appeals affirmed the circuit court's denial of respondent's post-conviction relief motion in Griffin v. State, 748 S.W.2d 756 (Mo.App. 1988) (A-164).

On June 3, 1988, respondent filed a petition for writ of habeas corpus under 28 U.S.C. §2254 before the United States District Court for the Eastern District of Missouri (A-101). On January 26, 1989, respondent was permitted to substitute appointed counsel of his

choosing and granted leave to amend the petition (A-33). On March 3, 1989, respondent filed an amended petition for writ of habeas corpus (A-88). After litigation before the district court, Magistrate David Noce filed his report and recommendation that the petition be denied (A-32). Chief District Judge Edward L. Filippine adopted the recommendation (A-27).

Respondent raised five points on appeal to the United States Court of Appeals from the district court's denial of his petition for writ of habeas corpus: 1) he was denied due process by the trial court's admission of Missouria Moss' testimony regarding telephone threats; 2) trial counsel was ineffective for failing to object to Missouria Moss' testimony regarding telephone threats; 3) trial counsel was ineffective in failing to contact, in-

terview and obtain Robert Campbell as a witness; 4) respondent was denied his right to confront Campbell when a statement by Campbell was admitted by means of a police officer's testimony; and 5) respondent was denied due process when the prosecutor allegedly used false testimony.

The United States Court of Appeals for the Eighth Circuit affirmed the district court's denial of respondent's petition for writ of habeas corpus on October 11, 1991. See Griffin v. Delo, 946 F.2d 1356 (8th Cir. 1991) (A-12). Respondent filed a petition for rehearing. After appointment of different counsel to represent respondent, the panel granted respondent's petition for rehearing and issued an opinion remanding the cause back to the district court on February 3, 1992. See Griffin

v. Delo, 956 F.2d 167 (8th Cir. 1992) (A-7). Petitioner filed a petition for rehearing or rehearing en banc. The court denied petitioner's motion for rehearing en banc, but Circuit Judges Fagg, Bowman and Hansen dissented (A-87). The panel modified its remand order granting rehearing on April 14, 1992 (A-1). The present petition for writ of certiorari ensues.

ARGUMENT

Whether abuse of the writ under 28 U.S.C. § 2254, Rule 9(b) is excused when a habeas petitioner alleges, in a petition for rehearing to the Court of Appeals, that previous habeas counsel "may not" have presented claims of constitutional dimension that "may have" merit to the district court, without alleging cause as required by McCleskey v. Zant, 499 U.S. (1991).

The present case represents an opportunity for this court to discuss the Court of Appeals' attempts to circumvent the clear language of McCleskey v. Zant, 499 U.S. ___, 111 S.Ct. 1454, 113 L.Ed.2d 617 (1991), regarding abuse of the writ under 28 U.S.C. §2244 and 28 U.S.C. §2254, Rule 9(b). The proliferation of abusive federal habeas corpus litigation in capital and noncapital settings requires the court

to monitor the federal judiciary to ensure compliance with McCleskey. The Court of Appeals' decision to remand the case under a standard less than McCleskey justifies this court's exercise of discretionary review. Supreme Court Rule 10.1(a), (c). Review of this case also presents the added advantage of giving the lower federal court's guidance in resolving abusive habeas litigation without this court being rushed by stay-of-execution litigation.[1]

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[1]Recognizing that the Supreme Court is considering an abusiveness petition in Sawyer v. Whitley, 112 S.Ct. 434 (1992), petitioner believes it may be appropriate to grant certiorari and remand the case back to the Court of Appeals for further consideration in light of the upcoming opinion in Sawyer.

The Court of Appeals remanded the case back to the district court holding that:

> We do not reach the merits of the appellant's assertions. We find it sufficient to say that counsel may not have recognized and presented issues of constitutional dimension during the post-conviction and habeas proceedings. Counsel may have also failed to adequately bolster claims actually raised. In light of the death sentence under which appellant labors and our granting of permission for his second attorney to withdraw, we believe that a remand with directions to allow the petitioner to raise additional issues for consideration by the district court is the most prudent course. (A-4-5).

The Court of Appeals saw no need to cite precedent; caselaw, statutes, rules, secondary authority, and the like, in support of its decision. The lower appellate court apparently felt

it was writing on a blank slate, but such a feeling is in error.[2]

The Court of Appeals' order remanding the cause back to the district court clearly violates this court's policies discussed in In Re Blodgett, ___ U.S. ___, 112 S.Ct. 674, 116 L.Ed.2d 669 (1992). The Court of Appeals' opinion creates a new rule which undermines the current policies of this court. Just recently, this court held that a habeas petitioner's attempt to avoid the application of McCleskey v. Zant, supra, requiring a petitioner to show cause for his failure to raise his claims in his prior petitions, "manipu-

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[2]This is not the first instance in which the Court of Appeals has remanded a case back to the district court in order to raise additional claims. See Murray v. Delo, No. 91-2542 (8th Cir. order dated November 13, 1991).

late[s] the judicial process." Gomez v. United States District Court, No. A-767 (U.S. April 21, 1992).

The Court of Appeals' opinion did not find that petitioner received ineffective assistance of state post-conviction motion counsel or ineffective assistance of habeas counsel. The Court of Appeals merely held that claims raised for the first time in his motion for rehearing "may have merit" (A-3). In fact, the Court of Appeals held "[w]e do not reach the merits of appellant's assertions [of ineffectiveness of habeas counsel]" (A-4). The court merely held that "[w]e find it sufficient to say that counsel may not have recognized and presented issues of constitutional dimension during the post-conviction and in habeas proceedings" and that "[c]ounsel may have also failed to adequately bolster claims

actually raised" (A-4-5) (emphasis added). This finding does not establish a sufficient basis for remanding the cause back to the district court. Rather, this action clearly violates this court's previous decisions in McCleskey and In Re Blodgett.

The Court of Appeals' language that counsel may not have recognized and presented issues of constitutional dimensions during post-conviction proceedings conflicts with this court's decision in Coleman v. Thompson, 499 U.S. ___, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991), which held that ineffective assistance of post-conviction counsel cannot constitute cause for procedural default or abuse of the writ. Although the Court of Appeals' opinion does not conclude that ineffectiveness constitutes cause, the remand because counsel "may not" have raised claims and "may

not" have bolstered claims warrants scrutiny since this is a standard that is less strict than ineffectiveness.

Pursuant to the Court of Appeals' opinion, a habeas petitioner need only allege that he or his counsel may have failed to recognize and present issues in order to be entitled to a remand to the district court. As the Court of Appeals seems to hold, a habeas petitioner/appellant may be entitled to remand if all conceivable claims were not litigated before the district court. Under the Court of Appeals' language, a habeas petitioner/appellant is entitled to remand if he can think up just one more claim during the appellate process. If after remand and appeal, appellant thinks up another claim, then remand again would be necessary.

As this court held in McCleskey v. Zant, supra, "[a]ttorney error short of ineffective assistance of counsel, however, does not constitute cause." Id. at 1470. Likewise, attorney ignorance or inadvertence is not "cause" because the attorney is petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must "bear the risk of attorney error." Coleman v. Thompson, supra at 2566-2567, quoting Murray v. Carrier, 477 U.S. 478, 488 (1986).

McCleskey holds that "the question is whether petitioner possessed, or by reasonable means, could have obtained the sufficient basis to allege a claim in his first petition and pursue the matter through the habeas process." Id. at 1472. This requires that petitioner include all relevant claims in his first petition. Id. Omission of a

claim "will not be excused" merely because evidence discovered later might have supported or strengthened the claim. Id. Although this is petitioner's first petition for writ of habeas corpus, the Court of Appeals have typically held that attempts to amend petitions after judgments is inequitable and an abuse of the writ. See Simmons v. Lockhart, 856 F.2d 1144, 1146 (8th Cir. 1988) (treating new claims in "Motion to Recall Mandate" as abusive), on appeal from remand, 915 F.2d 372 (8th Cir. 1990); Smith v. Armontrout, 888 F.2d 530, 540 (8th Cir. 1989) (treating new claims in "Motion to Remand" as abusive), stay denied, 493 U.S. 1039 (1990).

The Court of Appeals' opinion remanding the case to the district court because counsel "may not" have raised claims or "may not" have bolstered

claims actually raised severely depreciates this Court's decision in McCleskey, Coleman, and Murray. The Court of Appeals' opinion that habeas counsel may not have recognized and presented issues of "constitutional dimension" conflicts with this Court's holding in McCleskey v. Zant, supra, that a petitioner has no right to effective assistance of habeas counsel. Id. at 1471. However, since there is no express finding of ineffective assistance of habeas counsel, it appears that the appellate court found at most attorney error or inadvertence, a finding insufficient to support the legal conclusion of cause under Murray.

Moreover, under the Court of Appeals' standard, all cases would require reversal and remand when "counsel may have also failed to adequately bolster claims actually raised." (A-4-5).

By definition, all claims presented to the Court of Appeals by a habeas petitioner/appellant will not have been adequately bolstered since they were denied by the federal district court. The role of finality in the criminal law was discussed by this court in McCleskey v. Zant, supra at 1468-70. This court's opinion in McCleskey does not encompass multiple or even one remand just because an appellant asserts the existence of an unlitigated claim.

The order remanding the cause back to the district court by the Court of Appeals raises "the very concern regarding delay that were part of the rationale for this court's decision in Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982) and McCleskey v. Zant, 499 U.S. ___, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). Adherences to those decisions, and their prompt en-

forcement by the district courts and Court of Appeals will obviate in many cases what the Court of Appeals here seems to perceive to be the necessity for acknowledging multiple filings." In Re Blodgett, supra at 676.

The Court of Appeals' holding that "[i]n light of the death sentence under which appellant labors and our granting of permission for a second attorney to withdraw, we believe that remand with the direction to allow the petitioner to raise additional issues for consideration by the district court is the most prudent course", seems to distinguish this case simply because it is a capital case (A-5) (emphasis added). Such is contrary to this court's holding in Smith v. Murray, 477 U.S. 527, 538 (1986) ("we reject the suggestions that the principles of Wainwright v. Sykes applied differently depending on the

nature of the penalty a state imposes for the violation of its criminal laws.") The Court of Appeals' holding that remand is "prudent", does not explain the prudence in allowing the filing of a second, third, fourth, fifth or hundredth petition for writ of habeas corpus (A-5).

Petitioner submits that the Court of Appeals' remanding of the cause back to the district court in order that respondent may raise additional claims that were not raised in his original petition for writ of habeas corpus constitutes an abuse of the writ. Accordingly, petitioner respectfully requests this court to grant certiorari in order to examine the continuing attempts by the lower courts to circumvent this court's holdings regarding abuse of the writ.

CONCLUSION

Petitioner respectfully requests this court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit and reverse the judgment of that Court.

Respectfully submitted,

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APPENDIX TO
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VOLUME I

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October Term, 1991

LARRY GRIFFIN,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. 91-_____
	)	
PAUL DELO,	)	
	)	
Petitioner.	)	

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5. "Report and Recommendation" of Magistrate David D. Noce, filed September 27, 1989, in Larry Griffin v. Paul Delo, No. 88-1077C(2) (USDCEDED)- A-32

6. Order of the United States Court of Appeals for the Eighth Circuit, filed March 4, 1992, in Larry Griffin v. Paul Delo, No. 90-2377, denying petitioner's petition for rehearing en banc---------- A-87

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2377

Larry Griffin,	*	
	*	
Appellant,	*	
	*	Appeal from the
v.	*	United States
	*	District Court
	*	for the Eastern
Paul Delo,	*	District of
	*	Missouri.
	*	[PUBLISHED]
Appellee.	*	

Submitted: June 13, 1991

Filed: April 14, 1992

Before BEAM and FLOYD R. GIBSON, Circuit Judges and URBOM,[1] Senior District Judge.

PER CURIAM.

We grant the petition for rehearing filed by the appellant, vacate our

[1]The HONORABLE WARREN K. URBOM, Senior United States District Judge of the District of Nebraska, sitting by desination.

prior opinion, and file this opinion as our amended judgment.

Larry Griffin appeals the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Griffin initially argued for reversal on grounds that (1) he was denied due process, (2) he received ineffective assistance of counsel at trial, and (3) he was denied his right to confront an adverse witness. We affirmed the district court's denial of the petition.

The petitioner has now filed a pro se petition for rehearing, arguing that he was denied effective assistance by appointed counsel at trial and on direct appeal. In addition, he contends that counsel appointed to represent him during post-conviction and federal habe-

as proceedings failed to provide effective assistance. The latter counsel sought, and was granted, leave to withdraw.

New counsel was appointed and has now raised claims of constitutional violations during trial and appeal which may have merit and, therefore, warrant further review. We remand to the district court with directions that appellant be permitted to raise the new claims asserted in the request for rehearing.

Appellant's first appointed counsel represented him during trial and on direct appeal. A second attorney was appointed for post-conviction proceedings and was reappointed for federal habeas proceedings. A third attorney now represents appellant following the

withdrawal of prior counsel. According to appellant, the second attorney failed to provide effective assistance at both the post-conviction and habeas proceedings (1) by inadequately presenting and arguing issues before this court, and (2) by failing to recognize and raise a number of valid constitutional issues apparent from the record. Appellant makes specific note of several examples of this alleged ineffectiveness but does not attempt to provide an exhaustive list of such instances.

We do not reach the merits of the appellant's assertions. We find it sufficient to say that counsel may not have recognized and presented issues of constitutional dimension during the post-conviction and habeas proceedings. Counsel may have also failed to

adequately bolster claims actually raised. In light of the death sentence under which appellant labors and our granting of permission for his second attorney to withdraw, we believe that a remand with directions to allow the petitioner to raise additional issues for consideration by the district court is the most prudent course.

We conclude that appellant should have a reasonable opportunity to present his claims of constitutional error, subject, of course, to all claims and defenses available to the appellee. Accordingly, we retain jurisdiction of this matter, vacate the order of the district court and remand for further proceedings consistent with this opinion. The district court shall, within 180 days, consider new claims, defenses and certify its final

consideration of this matter to this court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2377

Larry Griffin,	*	
	*	
Appellant,	*	
	*	Appeal from the
vs.	*	United States
	*	District Court
	*	the Eastern
Paul Delo,	*	District of
	*	Missouri.
Appellee.	*	[PUBLISHED]

Submitted: June 13, 1991
Filed: February 3, 1992

Before BEAM and FLOYD R. GIBSON, Circuit Judges and URBOM,[1] Senior District Judge.

PER CURIAM.

We grant the petition for rehearing filed by the appellant, vacate our prior opinion, and file this opinion as our amended judgment.

[1]The HONORABLE WARREN K. URBOM, Senior United States District Judge for the District of Nebraska, sitting by designation.

Larry Griffin appeals the district court's denial of his petition for writ of habeas corpus under 28 U.S.C. § 2254. Griffin initially argued for reversal on grounds that (1) he was denied due process, (2) he received ineffective assistance of counsel at trial, and (3) he was denied his right to confront an adverse witness. We affirmed the district court's denial of the petition.

The petitioner has now filed a pro se petition for rehearing, arguing that he was denied effective assistance by appointed counsel at trial and on direct appeal. In addition, he contends that counsel appointed to represent him during post-conviction and federal habeas proceedings failed to provide effective assistance. The latter counsel

sought, and was granted, leave to withdraw.

New counsel was appointed and has now raised claims of constitutional violations during trial and appeal which may have merit and, therefore, warrant further review. We remand to the district court with directions that appellant be permitted to raise the new claims asserted in the request for rehearing.

Appellant's first appointed counsel represented him during trial and on direct appeal. A second attorney was appointed for post-conviction proceedings and was reappointed for federal habeas proceedings. A third attorney now represents appellant following the withdrawal of prior counsel. According to appellant, the second attorney

failed to provide effective assistance at both the post-conviction and habeas proceedings (1) by inadequately presenting and arguing issues before this court, and (2) by failing to recognize and raise a number of valid constitutional issues apparent from the record. Appellant makes specific note of several examples of this alleged ineffectiveness but does not attempt to provide an exhaustive list of such instances.

We do not reach the merits of the appellant's assertions. We find it sufficient to say that counsel may not have recognized and presented issues of constitutional dimension during the post-conviction and habeas proceedings. Counsel may have also failed to adequately bolster claims actually raised. In light of the death sentence

under which appellant labors and our granting of permission for his second attorney to withdraw, we believe that a remand with directions to allow the petitioner to raise additional issues for consideration by the district court is the most prudent course.

We conclude that appellant should have a reasonable opportunity to present his claims of constitutional error, subject, of course, to all claims and defenses available to the appellee. Accordingly, we vacate the order of the district court and remand for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF
APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2377

Larry Griffin,	*	
	*	
Appellant,	*	
	*	Appeal from the
vs.	*	United States
	*	District Court
	*	the Eastern
Paul Delo,	*	District of
	*	Missouri.
Appellee.	*	

Submitted: June 13, 1991

Filed: October 11, 1991

Before BEAM and FLOYD R. GIBSON, Circuit Judges, and URBOM[1], Senior District Judge.

URBOM, Senior District Judge.

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[1]The Honorable Warren K. Urbom, United States Senior District Judge for the District of Nebraska, sitting by designation.

Larry Griffin appeals from a judgment of the district court[2] denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. We affirm.

Griffin was convicted of capital murder pursuant to § 565.001 R.S.Mo. (1978) and was sentenced to death. The Supreme Court of Missouri affirmed the conviction and sentence on appeal. State v. Griffin, 662 S.W.2d 854 (Mo. banc 1983), cert. denied, 469 U.S. 873 (1984). Griffin's motion for post-conviction relief was denied. Griffin v. State, 748 S.W.2d 756 (Mo. App. 1988). His petition for federal habeas corpus relief pursuant to 28 U.S.C. § 2254 was

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[2]The Honorable Edward L. Filippine, United States District Judge for the Eastern District of Missouri.

denied by Judge Filippine, who adopted the magistrate judge's report and recommendations.[3]

Arguing for reversal, Griffin states that (1) he was denied due process by the admission of testimony from the victim's mother regarding telephone threats she purportedly received, (2) he received ineffective assistance of counsel when his attorney failed to object to the threat testimony and failed to contact, interview, or call a certain witness, (3) he was denied his right to confront an adverse witness when the trial court admitted hearsay testimony, and (4) he was denied due

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[3]The Honorable David C. Noce, United States Magistrate Judge for the Eastern District of Missouri.

process when the prosecutor knowingly used perjured hearsay testimony.

I. Threat Testimony

At the trial the state called the victim's mother as a witness to testify that she received anonymous threats over the telephone prior to her son's death. State v. Griffin, 662 S.W.2d 854, 859 (Mo. banc 1983). These threats were never directly or indirectly linked to the appellant.

Two independent grounds exist for affirming the district court's disposition of this claim. The procedural ground is that there was no timely objection at the trial and no request to strike the testimony, whereupon the petitioner has defaulted on this claim. Benson v. State, 611 S.W.2d 538

(Mo. app. 1980). Accordingly, the petitioner cannot receive federal habeas corpus relief unless he shows both cause and actual prejudice for his procedural default. Wainwright v. Sykes, 433 U.S. 81 (1977); Engle v. Isaac, 456 U.S. 107 (1982). Neither cause nor actual prejudice has been shown or attempted to be shown.

The substantive ground for denying relief is that admissibility of evidence is a matter of state law and generally does not give rise to constitutional error subject to redress in a federal habeas corpus case. Harrison v. Dahm, 880 F.2d 999, 1001 (8th Cir. 1990). An evidentiary question is reviewable "only when the alleged error infringes a specific constitutional right or is so grossly or conspicuously prejudicial that it fatally infected

the trial and denied petitioner fundamental fairness." Ford v. Armontrout, 916 F.2d 457, 460 (8th Cir. 1990), cert. denied, 111 S.Ct. 1594 (1991). The appellant has failed to show that the admission of the victim's mother's testimony was so egregious as to have infected the entire trial fatally and thereby make it fundamentally unfair. Hamilton v. Nix, 809 F.2d 463, 470 (8th Cir. 1960), cert. denied, 483 U.S. 1023 (1987). This ground for relief is without merit.

II. Ineffective Assistance of Counsel

Appellant contends that he received ineffective assistance of counsel when his trial counsel failed to object to the victim's mother's testimony concerning telephone threats she received prior to her son's death. We

disagree. The record discloses a proper and timely objection was not made by appellant's counsel, nor was a proper motion to strike made of the answer. Griffin, 662 S.W.2d at 859. However, on a motion for rehearing the Missouri Court of Appeals found that it need not address the claim of ineffective assistance of counsel, because the appellant failed to show how he was prejudiced. Griffin, 748 S.W.2d at 761. A claim of ineffective assistance of counsel is reviewed under the two-prong standard of Strickland v. Washington, 466 U.S. 668 (1984). First, the appellant must demonstrate that counsel's performance was deficient, and second, that such deficient performance prejudiced the appellant's defense. Id. at 687; Williamson v. Jones, 936 F.2d 1000, 1004 (8th Cir. 1991).

As to the first prong, there must be a showing that the attorney did not render reasonably effective assistance. Strickland, 466 U.S. at 687-88. In conducting such a review we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. The second prong requires appellant to demonstrate with reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

The Missouri Court of Appeals found that appellant's trial counsel had filed a motion in limine to exclude the victim's mother's testimony regarding the threats and that the motion was

denied. Griffin, 748 S.W.2d at 761.[4] Moreover, no evidence was ever presented to link appellant to the threats. Id. Given those facts, even if counsel failed to object to the testimony at trial, we find that his performance amounted to reasonable trial strategy, was not deficient, and no prejudice has been shown.

The appellant further alleges ineffective assistance of counsel because his attorney failed to contact, inter-

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[4]By a pro se letter dated August 5, 1991, the petitioner has said that the finding by the Missouri Supreme Court was in error, because "A search of the legal file reflects that a motion in limine was filed on June 22, 1981, this pleading did not address this issue in any form." Title 28, § 2254(d) requires that we presume the finding of the state court to be correct unless one of eight conditions obtains. None of those conditions has been shown to exist.

view, or call Robert Campbell as a witness who could allegedly refute damaging testimony of other witnesses. However, as explained below, the reasonable strategic and tactical decisions made by trial counsel cannot be the basis for finding ineffective assistance of counsel. Strickland, 466 U.S. at 690-691.

The trial strategy of the appellant's counsel was revealed at an evidentiary hearing, where he testified that the appellant's defense was one of alibi and more likely to succeed by keeping Campbell out of the courtroom with a motion in limine, but the motion was denied. Griffin, 748 S.W.2d at 759. It was counsel's opinion that Campbell's testimony could only implicate the appellant in an earlier attempt on the victim's life. Id. at

758. In that earlier incident in which Campbell was shot, he identified the vehicle from which his assailant alighted as one in which Griffin was soon thereafter apprehended. Id. Given such circumstances, trial counsel's actions in attempting to keep Campbell out of the courtroom were clearly trial strategy of a reasonable nature, and we find that counsel's assistance was not ineffective.

III. Confrontation of Witnesses

The appellant argues that the district court erred in finding that appellant was not denied his constitutional right under the sixth amendment to the United States Constitution to confront an adverse witness whose testimony was presented through admissible hearsay. We agree with the district court that

the appellant did not present that argument to the state courts for review. It is procedurally barred from review here.

The argument as raised on direct appeal to the Missouri Supreme Court was that the police officer's testimony "was irrelevant and its probative value was outweighed by its inflammatory and prejudicial nature." State v. Griffin, 662 S.W.2d at 857. His argument before this court is that his constitutional right of confrontation was denied by the receipt of that testimony. The two theories are not the same, and the substance of the appellant's federal habeas corpus claim was not previously presented to the state courts. See Buckley v. Lockhart, 892 F.2d 715, 719 (8th Cir. 1989), cert. denied, 110 S.Ct. 3243 (1990). The appellant has

made no showing of any cause for the default or actual prejudice and the claim is procedurally barred. Wainwright v. Sykes, 433 U.S. 72 (1977).

IV. Due Process

The last claim is that the district court erred in finding no denial of due process by the prosecutor's use of testimony allegedly known to be false. The appellant asserts that the prosecutor used hearsay statements of police officers to determine that Robert Campbell, after being shot, identified the appellant as his assailant, and purposefully did not call Campbell as a witness because the prosecutor knew his testimony would contradict the police officers' testimony. While a conviction obtained by the knowing use of perjured testimony is fundamentally

unfair, United States v. Agurs, 427 U.S. 97, 103 (1976), a challenge to evidence through another witness or prior inconsistent statements is insufficient to establish prosecutorial use of false testimony. United States v. White, 724 F.2d 714, 717 (8th Cir. 1984), cert. denied, 489 U.S. 1029 (1989) (citing with approval United States v. Sutherland, 656 F.2d 1181, 1203 (5th Cir. 1981), cert. denied, 455 U.S. 949 (1982)).

Griffin's allegation as to what Campbell's testimony would have been, had he testified, is wholly conjecture. The hearsay testimony in question was clearly admissible under the excited utterance exception and, therefore, bore a degree of trustworthiness. The prosecutions' use of the police officers' hearsay testimony was

not fundamentally unfair to the appellant. Furthermore, appellant has failed to show that the testimony was known to have been false or that the prosecutor's conduct was so egregious in the context of the entire trial that it rendered the trial fundamentally unfair. We find no denial of due process.

Having fully examined all of the appellant's allegations of error, we conclude that the decision of the district court denying habeas relief was correct.

Accordingly, we affirm the order of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,

EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LARRY GRIFFIN,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 88-1074C(2)
	)	
PAUL DELO,	)	
	)	
Respondent.	)	

MEMORANDUM AND ORDER

This matter is before the Court on the petition of Larry Griffin for a writ of habeas corpus. The matter was referred to United States Magistrate David D. Noce, who has filed his Report and Recommendation. 28 U.S.C. § 636(b). Petitioner and respondent[1] have filed objections thereto.

After careful consideration and a de novo review, the Court has decided

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[1]Paul Delo, the Superintendent of the Potosi Correctional Center, is now the proper party respondent.

to adopt the Report and Recommendation as modified herein.

Magistrate Noce determined that petitioner's third ground for relief is without merit. The Court agrees with that conclusion; however, the Court does not agree with the Magistrate that there was overwhelming evidence linking petitioner to the crime in question.[2] Instead, this Court finds that the evidence against petitioner was substantial. In all other respects, Magistrate Noce's conclusions on this point are adopted.

Accordingly,

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[2]The Court is aware that the Missouri Court came to different conclusion. See **State v. Griffin**, 662 S.W.2d 854, 858 (Mo. banc 1983) ("Admittedly, the facts here do not present the strongest possible case").

IT IS HEREBY ORDERED that the Report and Recommendation of the United States Magistrate is **SUSTAINED** and **ADOPTED** as modified herein.

An appropriate order shall accompany this memorandum and order.

Dated this 16th day of July, 1990.

--Edward L. Filippine--

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LARRY GRIFFIN,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 88-1074C(2)
	)	
PAUL DELO,	)	
	)	
Respondent.	)	

JUDGMENT

In accordance with the Order filed this date and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED and **DECREED** that respondent Paul Delo shall have judgment against petitioner, Larry Griffin, and the petition of Larry Griffin for habeas corpus relief is **DISMISSED** with prejudice.

IT IS FURTHER ORDERED that the stay entered by this Court on June 3, 1988, shall continue in effect for thirty days from the date of this Order to allow for the timely filing by petitioner of a notice of appeal.

Dated this 16th day of July, 1990.

--Edward L. Filippine--

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LARRY GRIFFIN,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 88-1074C(2)
	)	
PAUL DELO,	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

This cause is before the Court on the petition of Missouri state prisoner Larry Griffin for a writ of habeas corpus under 28 U.S.C. §2254. This matter was referred to the undersigned United States Magistrate for review and a recommended disposition. 28 U.S.C. §636(b).

On June 26, 1981, Larry Griffin was convicted of the capital murder of Quintin Moss by a jury in the Circuit Court of the City of St. Louis. On August 7, 1981, he was sentenced to death. The conviction was affirmed on

appeal by the Missouri Supreme Court. State of Missouri v. Griffin, 662 S.W.2d 854 (Mo. banc 1983). Griffin thereafter sought post-conviction relief in the Missouri courts pursuant to then Missouri Supreme Court Rule 27.26 (repealed, effective January 1, 1988). (Resp. Exh. F, G.) The Rule 27.26 hearing court denied Griffin's motion, and its denial of post-conviction relief was affirmed on appeal. Griffin v. State of Missouri, 748 S.W.2d 756 (Mo. App. 1988).

On June 3, 1988, Griffin filed the instant petition for federal habeas corpus relief pursuant to 28 U.S.C. §2254. On that same date, the District Court issued a stay of execution pending resolution of the petition. On January 26, 1989, Griffin was allowed to substitute appointed counsel of his

choice as well as leave to file an amended petition.

On March 3, 1989, Griffin filed his amended petition. He asserts 17 grounds for relief:

1. He was denied his right to confront adverse witnesses when the trial court admitted allegedly hearsay testimony;

2. he received ineffective assistance of counsel because his trial counsel failed to contact, interview, or obtain as a witness Robert Campbell;

3. he was denied due process when the trial court admitted testimony from the victim's mother regarding threats received prior to her son's death;

4. he received ineffective assistance of counsel because his trial counsel failed to object to the testimony outlined in ground 3;

5. he was denied due process when the trial court instructed the jury that petitioner could be convicted as a co-participant in the murder although he did not act, assist or was involved in said killing in any manner;

6. he received ineffective assistance of counsel when his trial counsel failed to object to the jury instruction at issue in ground 5 or preserve the issue for appeal;

7. he received ineffective assistance of counsel because his trial counsel failed to present any mitigating evidence at the punishment phase of the trial;

8. he received ineffective assistance of counsel because his trial counsel failed to properly question the jury panel regarding imposition of the death penalty;

9. he received ineffective assistance of counsel because trial counsel failed to attempt to rehabilitate jury panel members disqualified because of opposition to the death penalty;

10. he received ineffective assistance of counsel because his trial counsel failed to investigate his alibi defense;

11. he received ineffective assistance of counsel because his trial counsel failed to advise him of his right to testify during the penalty phase of the trial;

12. he was denied due process when the prosecutor used perjured hearsay testimony;

13. he received ineffective assistance of counsel because of "the cumulative effect of . . . trial counsel's errors";

14. he was denied equal protection and due process by the admission of evidence concerning his prior criminal conduct;

15. he received ineffective assistance of counsel because his counsel failed to object to the prosecutor's prejudicial characterization of him;

16. he was denied equal protection and due process because the sole aggravating circumstance in his case was applied in an overbroad manner thus permitting an arbitrary and capricious imposition of the death penalty; and

17. the death sentence "was imposed under the influence of passion, prejudice and other arbitrary factors", thus violating his Eighth Amendment protection from cruel and unusual punishment.

Petitioner argues that he is entitled to an evidentiary hearing on his federal habeas grounds. To be entitled to an evidentiary hearing, Griffin must establish one of the eight conditions for an evidentiary hearing set forth in 28 U.S.C. §2254(d). Griffin has failed to meet this requirement. A federal court may dismiss a habeas petition without an evidentiary hearing where the allegations are frivolous, where the allegations fail to state a consti-

tutional claim, where the relevant facts are not in dispute, or where the dispute can be resolved on the basis of the record. Urquhart v. Lockhart, 726 F.2d 1316, 1318-19 (8th Cir. 1984); Wallace v. Lockhart, 701 F.2d 719, 729-30 (8th Cir.), cert. denied, 464 U.S. 934 (1983). Because of the conclusions reached herein, an evidentiary hearing in this matter is not required.

Respondent concedes that Griffin has exhausted grounds 2, 4, 7, 8, and 16. Respondent asserts, however, that Griffin's grounds 3 and 17 fail to raise any federal constitutional claim that can be addressed in this proceeding. Respondent also argues that Griffin has failed to present grounds 1, 3, 5, 6, and 9 through 15 in the state courts in the procedurally proper manner and cannot do so now. Absent a demonstration of cause and prejudice,

respondent contends, these grounds are barred from consideration by a federal court in a habeas proceeding under Wainwright v. Sykes, 433 U.S. 72 (1977).

I. **Procedural Issues.**

Respondent contends that Griffin's third and seventeenth grounds fail to raise any constitutional claim, but rather raise only issues of state law. In his ground 3, Griffin alleges that his due process rights were violated by the trial court's admission of testimony from the victim's mother, Missouria Moss, concerning anonymous telephone threats received by her prior to her son's death. These threats were never directly or indirectly linked to Griffin. (Resp. Exh. A, at 48-52, 58-59.)

Although petitioner acknowledges that the admissibility of evidence is generally a matter of state law, he

contends that federal habeas relief is required "when an erroneous evidentiary ruling 'is of such magnitude that the result is a denial of fundamental fairness.' United States ex rel. Palmer v. DeRobertis, 738 F.2d 168, 170 (7th Cir.), cert. denied, 469 U.S. 924 . . . (1984)." (Traverse, filed June 19, 1989, at 9.) An erroneous ruling on state evidentiary law by a state court is not a cognizable ground for relief in a federal habeas proceeding when no violation of due process or another constitutional right is shown to have occurred. Urquhart v. Lockhart, supra, 726 F.2d at 1318; Harrison v. Dahm, No. 88-2596, slip op. at 4-5 (8th Cir. July 27, 1989). A federal court may not intervene in state judicial processes except to correct wrongs of a constitutional dimension. Wainwright v. Goode, 464 U.S. 78, 83 (1983) (per curiam).

Therefore, Griffin must demonstrate that the complained of error denied him fundamental fairness in his trial to state a claim cognizable under §2254. Warden v. Wyrick, 770 F.2d 112, 116 (8th Cir.), cert. denied, 474 U.S. 1035 (1985).

At Griffin's trial, a police officer testified that petitioner was seen shortly before the murder near the murder site in the vicinity of someone who was carrying what appeared to be a shotgun. (Resp. Exh. A, at 196-99.) Another witness testified that he had witnessed the murder, had a clear view of Griffin firing a weapon at the victim, and had provided a description and the license plate number of the vehicle used by Griffin and his co-participant. (Id., at 77-91). This description of the suspects' vehicle lead police to find a 1968 Chevrolet contain-

ing a carbine rifle, a pistol, ammunition, a red and white baseball cap and a court receipt bearing the name of "Reginald Griffin," the petitioner's cousin. (Id., at 162-73.) Subsequent expert testimony established that the carbine had fired a bullet fragment found at the murder scene. A .38 bullet fragment also found at the murder scene was of the same general type used in the revolver found in the abandoned Chevrolet. (Id., at 208-21.)

In view of the overwhelming evidence against Griffin at trial, the admission of the challenged testimony, if if was error, did not infringe a specific constitutional right and was not so prejudicial as to deny Griffin due process. Urquhart, supra, 726 F.2d at 1318; Harrison, supra, slip op. at 4-5. Griffin's ground 3 should there-

fore be dismissed with prejudice by the Court.[1]

Griffin's thirteenth ground also fails to state a cognizable claim for federal habeas relief. In this ground, Griffin asserts that the cumulative effect of all of his trial counsel's errors amounted to ineffective assistance of counsel. However, each ground for relief under §2254 must stand or fall on its own. Byrd v. Armontrout, 686 F.Supp. 743, 784 (E.D. Mo. 1988), aff'd, No. 88-1903, slip op. at 17 (8th Cir. June 27, 1989). Griffin cannot succeed by accumulating several ineffective assistance of counsel claims into one, overarching allegation. Rather,

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[1]Because of this conclusion, respondent's contention that this claim is subject to a procedural bar will not be addressed.

each habeas claim "must stand on its own." Byrd v. Armontrout, No. 88-1903, slip op. at 17 (8th Cir. June 27, 1986). This ground should be dismissed with prejudice.

Despite Griffin's invocation of the Eighth Amendment, the undersigned concludes that his ground 17 also fails to raise a cognizable claim in this proceeding. Griffin's claim that the penalty imposed was "a product of passion, prejudice, and other arbitrary factors" is a state-law claim which has already been addressed by the Missouri Supreme Court. State of Missouri v. Griffin, supra, 662 S.W.2d at 859-60. Even the dissent found "no indication that the jury acted out of passion or prejudice . . .." Id., at 863 (Blackmar, J., dissenting). Furthermore, if Griffin is arguing that his sentence was disproportionate to the

offense committed, the undersigned notes that he cannot, in this proceeding, relitigate the proportionality review performed by the Missouri Supreme Court. See, Pulley v. Harris, 465 U.S. 37, 50-51 (1984). This claim should also be dismissed with prejudice by the Court.

Respondent next contends that Griffin's first ground for relief is unexhausted, because it was not fairly presented to the state courts. Respondent further argues that a successive motion for post-conviction relief cannot now be filed because Missouri Supreme Court Rule 29.15 (replacing Rule 27.26) expressly prohibits successive motions. Thus, respondent contends, Griffin's ground 1 for relief is subject to an adequate and independent state procedural bar to federal re-

view. Wayne v. Wyrick, 735 F.2d 324, 325 (8th Cir. 1984) (per curiam).

The record reflects that Griffin raised a similar, albeit not identical, claim in his motion for a new trial (Resp. Exh. B, at 16-17). However, Griffin failed to raise this ground or one similar to it on appeal either with respect to the testimony of Officer Murphy or Officer Frederickson (Resp. Exh. C). He also failed to address this ground during his Rule 27.26 litigation (Resp. Exh. G, H, I and J.) Petitioner claims that this issue was raised in his Rule 27.26 litigation and addressed by the Rule 27.26 hearing court. (Resp. Exh. G, "Judge Peek's Ruling," at 4-6). However, there Griffin only alleged that his trial counsel rendered ineffective assistance by failing to interview and secure as a witness Robert Campbell. (Id.)

It is apparent from the record that the state courts were denied the opportunity to consider petitioner's ground for relief. Until June 30, 1988, petitioner could have moved to set aside his conviction pursuant to Missouri Supreme Court Rule 29.15(1). However, he failed to utilize this procedure prior to that date. Petitioner cannot now raise his ground in the state courts by way of a post-conviction motion, and there is no other state remedy available to him for this ground. Barks v. Armontrout, No. 88-1960, slip op. at 3-4 (8th Cir. June 29, 1988). This Court is, therefore, free to determine the merits of his first federal habeas ground absent deliberate bypass or default of state procedures. Fay v. Noia, 372 U.S. 391, 438 (1963); Wainwright, supra, 433 U.S. at 86-88.

Waivers affecting federal rights are federal questions to be determined under federal standards. Rodgers v. Wyrick, 621 F.2d 921, 927 (8th Cir. 1980). Where the waiver relates to trial events or was made by counsel in petitioner's behalf, the cause and prejudice standard applies. Id. This standard applies even to a failure to raise an issue on direct appeal. Worthan v. Wyrick, 805 F.2d 303, 305 (8th Cir. 1986), cert. denied, 481 U.S. 1019 (1987), citing, Murray v. Carrier, 477 U.S. 478, 490-92 (1986).

Because petitioner's first federal habeas ground was not fairly presented to the state courts, nor can it now be, the Court must determine whether petitioner can demonstrate (1) "adequate cause to excuse his failure to raise the claim in state court properly", and if he can show such cause, then he must

also show (2) "actual prejudice to his defense resulting from the state court's failure to address the merits of the claim." Smittie v. Lockhart, 843 F.2d 295, 296 (8th Cir. 1988).

Petitioner has not alleged nor demonstrated any reason for his default. (Petitioner's reply brief, at 13-18). As a result, this Court may not address the merits of the claim. In order to fairly present a claim to the state courts, "the petitioner must have informed the state court of both the factual and the legal premises of the claim he asserts in federal court." Daye v. Attorney General of State of New York, 696 F.2d 186, 191 (2d Cir. 1982) (en banc), cert. denied, 464 U.S. 1048 (1984) (emphasis in original). This is required so that the state courts may apply the controlling legal principles to the facts bearing

upon Griffin's federal constitutional claim. Picard v. Connor, 404 U.S. 270, 277-78 (1971).

Griffin's Rule 27.26 appellate counsel's failure to raise the claim on appeal does not constitute "cause," because the "cause" necessary to overcome the procedural bar is "cause" that would be in itself an independent ground justifying habeas corpus relief. See, Murray v. Carrier, supra, 477 U.S. at 489; Leggins v. Lockhart, 822 F.2d 764, 768 n.5 (8th Cir. 1987), cert. denied, 108 S.Ct. 1080 (1988); cf., Stokes v. Armontrout, 851 F.2d 1085, 1092 n.8 (8th Cir. 1988), cert. denied, 109 S.Ct. 823 (1989). A claim of ineffective assistance of Rule 27.26 hearing or appellate counsel cannot be an independent ground for federal habeas relief. See, Williams v. State of Missouri, 640 F.2d 140, 143-44 (8th

Cir.), cert. denied, 451 U.S. 990 (1981); Mitchell v. Wyrick, 727 F.2d 773, 774 (8th Cir.), cert. denied, 469 U.S. 823 (1984). In sum, Griffin's ground 1 should be barred from federal habeas review.

Next, respondent argues that Griffin's grounds 5 and 6 are also procedurally barred from habeas review. In ground 5, Griffin alleges that he was denied due process when the trial court instructed the jury (Instruction No. 6) that he could be convicted as a co-participant in the murder even though he did not act, assist or was involved in said killing in any manner. Ground 6 alleges that Griffin received ineffective assistance of counsel by failing to object to Instruction No. 6 or to preserve the issue for appeal.

Despite respondent's argument that these grounds are subject to a procedural bar, there is no procedural bar to proceeding directly to the merits of meritless claims and dismissing them for this reason. Thompson v. Jones, 870 F.2d 432, 434 (8th Cir. 1988). Griffin's fifth ground is wholly without merit. Instruction No. 6 states:

If you find and believe from the evidence beyond a reasonable doubt:

> First, that on or about June 26, 1980, in the City of St. Louis, State of Missouri, the defendant or another person caused the death of Quintin Moss by shooting him, and
>
> Second, that the defendant and another person intended to take the life of Quintin Moss, and
>
> Third, that the defendant and another person knew that they were practically certain to cause the death of Quintin Moss, and
>
> Fourth, that the defendant and another person considered taking the life of Quintin Moss and reflected upon this

matter coolly and fully before doing so,

then you are instructed that the offense of capital murder was committed, and if you further find and believe from the evidence beyond a reasonable doubt:

Fifth, that in the commission of such offense the defendant acted with such other person with the purpose of committing that offense.

then you will find the defendant guilty of capital murder.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of the offense.

(Resp. Exh. B, at 31). It is readily apparent that this jury instruction did not permit Griffin to be convicted without any involvement in the killing of the victim as he alleges. Ground 5 should be denied on the merits.

In ground 6, Griffin contends that his trial attorney was ineffective because he failed to object to Instruction 6. However, the Missouri Supreme

Court held that there was no error in the trial court's use of this instruction. State of Missouri v. Griffin, supra, 662 S.W.2d at 857. A federal court in a habeas corpus proceeding is bound by an interpretation of state law by the highest court of a state. See, Harkins v. Wyrick, 589 F.2d 387, 391 (8th Cir. 1979). The Missouri Supreme Court having held that the jury instruction was not submitted in error, Griffin cannot demonstrate that his trial counsel was ineffective because he did not object to its submission or preserve the issue for appeal. This ground should also be denied as being without any merit.

In ground 9, Griffin argues that his trial counsel rendered ineffective assistance because he failed to attempt to rehabilitate the jury panel members disqualified because of their opposi-

tion to the death penalty. This ground was not raised on direct or collateral appeal.[2] Griffin has failed to explain cause for his procedural default or to demonstrate how he has suffered actual prejudice. Smittie, supra, 843 F.2d at 296. This ground should therefore be procedurally barred from federal habeas review.[3]

Respondent next argues that Griffin's grounds 10, 11, and 12 are all procedurally barred from federal habeas review because they were not

---

[2]Griffin did raise another claim regarding the voir dire process in his Rule 27.26 appeal. (Resp.Exh. H, at 3, 9-10, 23). However, that claim is the instant ground 8.

[3]An identical argument was rejected in Straight v. Wainwright, 772 F.2d 674, 680 (11th Cir. 1985), cert. denied, 475 U.S. 1099 (1986). Therein, the Eleventh Circuit found no merit to this argument.

presented to a state appellate court for review. The undersigned disagrees. Griffin's federal habeas grounds 10, 11 and 12 were presented to the Missouri Court of Appeals, Eastern District, on Griffin's Rule 27.26 appeal. (Resp. Exh. H, at 3; I, at 14.) Therefore, these claims will be addressed on their merits below.

In his fourteenth ground for habeas relief, Griffin argues that he was denied equal protection and due process by the trial court's admission of evidence of his alleged prior criminal conduct and the prosecutor's "repeated innuendo of [his] evil character" to establish a probability of guilt. Respondent contends that this ground also is procedurally barred from federal court review. This ground was not raised on direct or collateral appeal. Griffin has not explained cause to the

Court for his procedural default nor demonstrated how he has suffered actual prejudice. Smittie, supra, 843 F.2d at 296. Ground 14 should thus be procedurally barred from federal habeas review.

Finally, respondent contends that Griffin's fifteenth ground is procedurally barred from federal habeas review as well. In this ground, Griffin alleges that his trial counsel rendered ineffective assistance in failing to properly object to a prosecution witness' characterization of him as a "police character." This ground was also not presented to the state courts for review either on Griffin's direct or appellate appeal. Petitioner has offered no explanation for his procedural default. This ground should therefore be barred from review in this proceeding.

II. **Discussion of the Merits.**

Of Griffin's 14 cognizable federal habeas claims, eight have been exhausted in the state courts and are open to review by this Court (grounds 2, 4, 7, 8, 10, 11, 12 and 16). Habeas corpus relief is available on petitioner's ineffectiveness of counsel claims, if it is shown that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). A habeas petitioner must first demonstrate that counsel's performance fell below an objective standard of reasonableness. Id., at 687-88. In this regard, petitioner must overcome a strong presumption that counsel has rendered effective assistance. Id., at 690; Blackmon v. White, 825 F.2d 1263, 1265 (8th Cir. 1987). Counsel's strategic

choices made after thorough investigation are virtually unchallengeable, and decisions following less thorough, but nevertheless reasonable, investigation are to be upheld to the extent that they are supported by reasonable professional judgment. Strickland, supra, 466 U.S. at 690-91.

Second, in order to prevail on an ineffective assistance of counsel claim, a habeas petitioner must demonstrate prejudice resulting from counsel's dereliction of duty. Id., at 687. This requires a showing that, but for counsel's deficient performance, there exists a reasonable probability that the outcome of the case would have been different. Id., at 694.

Griffin's second federal habeas claim alleges that his trial attorney was ineffective because he failed to contact, interview, question or call

Robert Campbell as a witness. Griffin contends that had Campbell testified, he would have refuted Officer Murphy's testimony concerning Campbell's alleged statements linking Griffin to a previous attempted murder of the victim, Quintin Moss. This claim was raised in Griffin's Rule 27.26 litigation. The Rule 27.26 trial and appellate courts made factual findings concerning this ground for relief. (Resp. Exh. G, at 4-6; Resp. Exh. J, at 2-6.) The factual findings of the state court are entitled to the presumption of correctness established in 28 U.S.C. §2254(d) so long as these findings are fairly supported by the record. Wainwright v. Goode, supra, 464 U.S. at 85. The presumption applies only to historical facts, however, not to the mixed issue of whether petitioner received ineffective assistance of counsel. Kellogg v.

Scurr, 741 F.2d 1099, 1101 (8th Cir. 1984); see, Miller v. Fenton, 474 U.S. 104, 110-12 (1985).

The Missouri Court of Appeals made the following relevant factual findings:

> . . . Campbell was the unintended victim of a prior attempt on Moss' life. On May 13, 1980 police responded to a report of a shooting at Sarah and Olive streets. There they found a bleeding and dazed Robert Campbell. Quintin Moss was beside him. Campbell told police that a black over brown older Cadillac carrying two black males stopped. One of the occupants got out of the car and fired several shots, one of which struck Campbell in the leg. Within a half hour of that shooting police spotted [Griffin] and his nephew in a black over brown 1968 Cadillac three miles from the scene of the shooting.
>
> Campbell did not testify at trial but his statements concerning the May 13 incident were introduced via the testimony of the officers who arrived at the scene of the shooting. [Griffin] now claims that had Campbell been called to testify at trial he could have refuted the testimony of the police officers and would have stated that he was unable to identify [Griffin] as the gunman. The hearing court found that the

actions of trial counsel were strategical decisions and as such were not a proper basis for finding trial counsel ineffective. We agree.

The attorney who represented the state at [Griffin's] trial testified at the evidentiary hearing that he sought to have Campbell testify to this prior attempt in order to prove scheme, knowledge, intent and premeditation in the later shooting of Moss. It was hoped that this testimony would also identify the defendant as the gunman in the later incident. It was the state's position that Campbell had told officers who arrived on the scene of the May 13 shooting that a black and brown Cadillac carrying two black males stopped at Sarah and Olive streets. One of the occupants alighted and fired several shots from a gun, one of which hit Campbell. After Campbell was transported to the hospital, the police brought the defendant to Campbell's hospital room for identification. Campbell expressed fear of Griffin and declined to identify him as the gunman. Campbell was subpoenaed to testify at the trial but prior to trial he told investigators that he feared Griffin and would leave the courtroom if needed to avoid testifying. After a diligent search, the prosecuting attorney was unable to locate Campbell the day of trial.

[Griffin's] trial counsel had represented [Griffin] on other matters in the past. At the evidentiary hearing counsel testified that from the time of [Griffin's] arrest until his trial, counsel met with [Griffin] in excess of twenty or twenty-five times. During the course of these meetings every detail of [Griffin's] case was discussed including the possible testimony of Robert Campbell. Counsel was aware of the existence and contents of the police reports concerning the May 13 shooting. In particular counsel was familiar with the substance of the statements made by Campbell to the police. Counsel stated, however, that he was unaware that Campbell had, at any time, expressed fear of [Griffin]. Counsel stated that he did not contact Campbell or seek to have him testify at trial for the following reasons:

> . . . [I]t was pretty clear from the reports that were given to us what their basic case outline was going to be. Our defense was one of alibi. And our pre-trial in terms of how specifically we would formulate our defense, our concerns with Mr. Campbell was [sic] keeping him out of the courtroom rather than bringing him in . . . . [I]t was my feeling or our feelings--whatever--that the best way to present the defense was to make it a clean and simple alibi

> defense. I felt that we had some very good, very strong witnesses on the alibi, and a good circumstantial basis for it. And what we were trying to do was to limit what I saw the State's efforts to make a nexxus [sic] of this whole common scheme. And what we were trying to do, and what we did pre-trial on the motions was to try and keep as much of this out on the basis that it had absolutely nothing to do with Larry [Griffin].

In furtherance of this strategy counsel filed a pre-trial motion in limine to exclude Campbell's testimony. That motion was overruled. However, defense counsel, in anticipation of this event, had prepared a fall-back position. Upon cross-examination defense counsel would attempt to elicit testimony from Campbell that he was unable to identify Griffin as the gunman in the May 13, 1980 shooting. However, none of these strategies came to fruition because, although he had been subpoenaed, Campbell could not be found on the day of trial and did not testify.

Campbell, some six years later, testified at the evidentiary hearing regarding the circumstances surrounding the May 13, 1980 shooting. While he stated that his back was toward the car carrying the gunmen, the bullet that struck him entered the

side of his right thigh, traversed it and went into his left thigh. Immediately after the shooting he was dazed and was taken to the hospital for treatment. While Campbell did not recall making any statements to the police regarding the car or its occupants he does not deny making any such statements.

Two police officers escorted two men to the hospital for possible identification, however, Campbell was unable to identify either as the gunman. Campbell stated that he did not know Griffin prior to the shooting and as a result had no reason to fear him. Campbell was not contacted by [Griffin's] attorney but was subpoenaed by the state to testify at trial. However, when he appeared on the day of trial he was told by a unidentified employee that he was no longer needed so he left. Campbell further stated that this would have been his testimony had he been called to testify at [Griffin's] trial.

[Griffin's] own testimony at the evidentiary hearing contradicts that of Campbell. [Griffin] testified that after the May 13 shooting he and his nephew were escorted by the police to the hospital where Campbell was receiving treatment. When asked what Campbell said in response to [Griffin's] presence in the hospital [Griffin] replied, "He said that we was the ones."

> [Griffin] testified that he told his attorney about this statement.

(Resp. Exh. J, at 3-6) (footnote omitted).

The reasonable strategic and tactical decisions of counsel may not serve as a basis for a finding of ineffective assistance. Strickland, supra, 466 U.S. at 690-91; Bell v. Lockhart, 741 F.2d 1105, 1107-09 (8th Cir. 1984). Griffin's counsel made a reasonable investigation as to this potential witness' probable testimony, understood the nature of the anticipated testimony and decided not to call Campbell as a witness. Indeed, defense counsel pursued an unsuccessful effort to keep Campbell from testifying and then prepared a line of cross-examination to minimize the expected damaging testimony. After a review of the entire record, the undersigned concludes that the Rule 27.26 appellate court's find-

ings of fact are fairly supported and that Griffin was not denied effective assistance of counsel as alleged in his second federal habeas ground.

Griffin next argues that his trial counsel rendered ineffective assistance because counsel failed to object to testimony from the victim's mother regarding threats she had received. This objection is without any merit. The record demonstrates that Griffin's trial counsel twice objected to this testimony at trial in an attempt to exclude it. (Resp. Exh. A, at 48-51). Griffin's fourth ground for federal habeas relief should be denied.

In his ground 7, Griffin contends that he received ineffective assistance of counsel because his trial counsel failed to present any mitigating evidence in Griffin's behalf during the punishment phase of the trial. This

claim was addressed by the Rule 27.26 appellate court. The Missouri Court of Appeals made the following relevant factual findings:

> In his second point [Griffin] avers that the [Rule 27.26] hearing Court erred when it declined to find trial counsel ineffective for failing to offer mitigating circumstances at the penalty phase of his trial. [Griffin] argues that "trial counsel should have recognized and submitted the most obvious mitigating circumstances which the jury could have considered in assessing punishment-the victim's implication in [Griffin's] brother's death." Failure to present this evidence along with counsel's failure to call family members to plead for his life, according to [Griffin], deprived him of effective assistance of counsel.
>
> At the evidentiary hearing trial counsel stated that there were no statutory mitigating circumstances available to him but recognized that he was free to present evidence beyond that listed in the statute. He recognized that he could have put on family members to make a plea for mercy. However, the defense was based on alibi and [Griffin] had maintained his innocence throughout his trial. Counsel felt that presenting such evidence would send a message to the jury that said "we have

> been lying to you all week, but give us a break." Counsel felt that such a maneuver would undermine the credibility that he had been trying to establish throughout the trial. [Griffin] testified that counsel had presented him with a list of statutory mitigating circumstances and he agreed with counsel that none of the statutory circumstances applied to his situation. When asked at the evidentiary hearing what information the jury should have heard about him that may have caused the jury not to recommend death[,] [Griffin] replied, "I don't know."

(Resp. Exh. J, at 8-9). These findings of the state court as to historical facts are fairly supported by the record and are entitled to §2254(d)'s presumption of correctness. Goode, supra, 464 U.S. at 85.

It is apparent that trial counsel, after reasonable investigation, made a deliberate strategic decision not to offer any evidence in mitigation of punishment at Griffin's trial. If trial counsel through neglect failed to discover mitigating evidence, he would

be found ineffective. Laws v. Armontrout, 863 F.2d 1377, 1384-86 (8th Cir. 1988). However, where mitigating evidence was not produced because counsel, after reasonable investigation and exercise of reasonable professional judgment, determined that withholding such evidence was the more strategically sound course, there is no constitutional violation. Id. The instant case meets the latter criteria and Griffin's trial counsel cannot be deemed ineffective for his decision not to present evidence in mitigation of punishment. Ground 7 should be denied on the merits.

Griffin's federal habeas ground 8 alleges that he received ineffective assistance of counsel because his "trial counsel was ineffective during the voir dire stage of trial in failing to question the jury panel whether they

would automatically impose a sentence of death after a finding of capital murder." (Amended petition, at 4.) In short, Griffin claims that his counsel was ineffective because he did not attempt to "life qualify" the jury panel. (Petitioner's Reply, at 21). Griffin argues that his counsel should have attempted to insure that potential jurors would not be "locked in" to the death penalty but would also consider a sentence of life imprisonment upon a finding of guilt.

The undersigned concludes that this argument has no merit. Prospective jurors were not asked by the state whether they would automatically impose the death penalty if Griffin was found guilty of capital murder. Rather, jurors were asked if they could consider the death penalty as an alternative within the range of punishment possible

if they were so instructed by the court after a finding of guilt. (Resp. Exh. J, at 9-10). Thus, the prosecution properly "death-qualified" the jury panel pursuant to Witherspoon v. Illinois, 391 U.S. 510 (1968). The only reason to have followed Griffin's suggested voir dire strategy would be to confuse prospective jurors. See Straight v. Wainwright, supra, 772 F.2d at, 680. Furthermore, Griffin has made no showing that any juror had a "closed mind" regarding the possible punishment. He, therefore, cannot demonstrate that he has suffered prejudice as required by Strickland, supra, 466 U.S. at 686. Ground 8 should be denied.

In his tenth ground for federal habeas relief, Griffin argues that he received ineffective assistance because his trial counsel failed to properly investigate Griffin's alibi defense.

This claim was raised in Griffin's Rule 27.26 litigation. (Resp. Exh. G, at 5, 9-10; H, at 3.) The Rule 27.26 hearing court made the following relevant factual findings concerning ground 10:

> [Griffin] informed Attorney Steiger that on the day of Quintin Moss's killing, he [Griffin] was with his brother-in-law, Gilbert Greenlee. Greenlee confirmed this during his testimony at trial. The day was significant because it was that day, June 26, 1980 that he was sold his canoe, through an ad in the "Tradin Times," (TR. 332), confirmed by reference to his calendar. Greenlee testified that he had sold the canoe at about 5:00 p.m. on the 26th and notified the people from "Tradin Times" the next day that he had sold it. (TR. 354).
>
> In rebuttal the State called a representative from the "Tradin Times" who testified that according to their records the call notifying them that the canoe had been sold came in on June 26, 1980 (TR 374), i.e., the day before Greenlee testified he reported the sale and the same day as the killing.
>
> [Griffin] contends his trial counsel was ineffective because he did not contact anyone from the "Tradin Times".

> The Court was unable to find anything in the record to indicate that Attorney Stieger was aware, prior to Greenlee's testimony in court that the latter had called "Tradin Times" the day after the sale to cancel his ad. Further there is no indication as to what effect knowledge of the "Tradin Times" records would have had on [Griffin's] defense of alibi.

(Resp. Exh. G, at 9-10.)

In neither his original or amended petition nor in his reply brief does Griffin offer any explanation as to what aspect of his alibi defense his trial counsel failed to investigate. Assuming that his contention is the same as the one he presented to the Rule 27.26 hearing court, the state court found that his attorney did not know until Greenlee testified that this witness would claim that he called the "Tradin Times" on June 26, 1980, allegedly the day after the sale of his canoe in an attempt to bolster Griffin's alibi. (Id.) This finding is support-

ed by the record and entitled to a presumption of correctness. Goode, supra, 464 U.S. at 85. However, even if Griffin's trial counsel was aware of this testimony prior to trial and failed to contact the "Tradin Times," the undersigned concludes that ineffective assistance was not rendered. The rebuttal testimony from the "Tradin Times" did not directly contradict Greenlee's alibi for Griffin on June 26, 1980; it only attacked Greenlee's credibility on the issue of when he reported the sale. Under these circumstances, the undersigned concludes that Griffin cannot demonstrate that he received ineffective assistance of counsel. Ground 10 should be denied.

Ground 11 alleges that his trial counsel rendered ineffective assistance by failing to advise him of his right to testify during the penalty phase of

his trial. This claim was presented to the state courts in Griffin's Rule 27.26 litigation. (Resp. Exh. G, at 5-6, 11-12; H, at 3). The Rule 27.26 hearing court made the following findings of fact regarding this allegation:

> [Griffin] testified that he asked his attorney to let him testify in the guilt phase of the trial but that Steiger told him that if he did, his prior convictions would be brought out and therefore it would not be in his best interest to testify. [Griffin] said that Steiger never told him that if he were found guilty of capital murder, his priors could be brought in during the penalty phase. He said had he known that he would have insisted on testifying during the guilt phase of his trial. On redirect examination [Griffin] said that if he knew then, what he knows now, he would have testified.
>
> However, on cross-examination [Griffin] stated that he could not say what information he would have offered if allowed to testify, only (later on re-cross) that he feels that if he had taken the stand he could have convinced the jury he was innocent. (Presumably despite the added burden of having his prior convictions introduced to impeach his credibility.)

> Mr. Steiger testified that he was aware that [Griffin's] priors could be brought out in the penalty phase but still felt his client should not testify.
>
> It is not even appropriate to say that "hind sight is 20-20" since in this case there is no way of knowing what, if any, effect [Griffin's] testimony would have had on the results in either phase of his trial. [Griffin] has not indicated what he would have said or how he feels it would have influenced the outcome.

(Resp. Exh. G, at 11-12). These findings of fact are fairly supported by the record and are thus entitled to §2254(d)'s presumption of correctness. Goode, supra, 464 U.S. at 85.

Griffin has failed to indicate in his Rule 27.26 proceedings or in his filings in this cause what he would have said had he testified during the penalty phase of his trial. He only contends that he would have belatedly convinced the jury he was innocent. This conclusory argument fails to demonstrate the prejudice required under

Strickland, supra. Therefore, this claim of ineffective assistance of counsel should be denied.

Next, Griffin contends that he was deprived of his right to due process because of prosecutorial misconduct during his trial. Specifically, Griffin alleges that the state declined to use the available testimony of Robert Campbell. Rather, the state is accused of using the "perjured" testimony of Officer Murphy to relate what Campbell had reportedly said regarding the previous assault upon Quintin Moss in which he (Campbell) was injured. This claim was presented to the state courts in Griffin's Rule 27.26 litigation. (Resp. Exh. G, at 7; H, at 18-19; I, at 14).

When a prosecutor engages in conduct that deprives the defendant of a fair trial, due process in violated.

Darden v. Wainwright, 477 U.S. 168, 180-81 (1986). Relief, however, is only available when the prosecutor's conduct is so egregious in the context of the entire trial that it renders the trial fundamentally unfair. See, e.g., Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974); Nassar v. Sissel, 792 F.2d 119, 122-123 (8th Cir. 1986).

This ground for relief has no merit. The record demonstrates that Campbell was available as a witness to the defense but that Griffin's trial counsel chose not to subpoena Campbell because the prosecution had already done so. However, the defense was not prohibited from subpoenaing a witness already subpoenaed by the state. Campbell was in fact subpoenaed but failed to appear at trial when called to testify. (Resp. Exh. F, at 33-34; J, at 5-6.) At petitioner's Rule 27.26 mo-

tion hearing, Campbell stated that he left the trial before testifying after "an unidentified court employee" told him that his testimony was no longer necessary.

Even should the Court assume that the prosecution was responsible for Campbell's unavailability as a witness and that the defense had detrimentally relied upon the prosecutions' subpoena of Campbell, Griffin's ground 12 should still be denied. Petitioner cannot demonstrate that this alleged act so infected his entire trial so as to render it fundamentally unfair. Campbell had earlier identified Griffin as the person who shot him in a prior attempt to kill Moss. Although Campbell stated at the Rule 27.26 hearing that he would not have identified Griffin as the assailant, this testimony was five years after the trial whereas his previous

statement identifying Griffin as the assailant was less that a year before the trial. Exactly how Campbell would have testified at trial is a matter of speculation, not fact. In any event, the other evidence of Griffin's guilt in the killing of Quintin Moss that was presented at trial was overwhelming. Ground 12 should be denied.

Finally, Griffin contends that he was denied his equal protection and due process rights because the sole aggravating circumstance in his case was applied in an overly broad fashion, thus allowing the arbitrary and capricious imposition of the death penalty. Griffin challenges the application of former §565.012.2(3), R.S.Mo. 1978 (repealed, effective 10-1-84). That statutory aggravating circumstance required the state to prove beyond a reasonable doubt that Griffin, "by his act of capi-

tal murder [,] knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person . . .." Griffin contends that the instruction was devoid of clear and objective standards. Instruction No. 20 provided:

> In determining the punishment to be assessed against the defendant for the murder of Quintin Moss, you must first unanimously determine whether the defendant by his act of murdering Quintin Moss knowingly created a great risk of death to more than one person in a public place by means of a weapon which would normally be hazardous to the lives of more than one person.
>
> You are further instructed that the burden rests upon the state to prove beyond a reasonable doubt the foregoing circumstance, and that it is an aggravating circumstance. The defendant is not required to prove or disprove anything.
>
> Therefore, if you do not unanimously find that the evidence beyond a reasonable doubt that the foregoing circumstance exists and

> that it is an aggravating circumstance, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

(Resp. Exh. B, at 45).

The death penalty cannot be imposed without a finding of at least one aggravating circumstance. Zant v. Stephens, 462 U.S. 862, 878-80 (1983). Aggravating circumstances must genuinely narrow the class of persons subject to the death penalty and reasonably justify imposing a more severe sentence on a particular defendant than on others convicted of murder. Id., at 877. Therefore, the aggravating circumstance may not be impermissibly vague. Id., at 881.

In order for the death penalty to not be applied in an arbitrary and capricious manner, the state "must chan-

nel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (footnotes omitted). Furthermore,

> Because the channeling function of an aggravating circumstance requires objective determination of such a factor, it must be described in "terms that are commonly understood, interpreted and applied." Cartwright v. Maynard, 822 F.2d 1477, 1485 (10th Cir. 1987) [, aff'd, 108 S.Ct. 853 (1988)]. Otherwise a standard may be so vague that it would "fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in [Furman v. Georgia, 408 U.S. 238 . . . (1972)] could occur." Zant v. Stephens, 462 U.S. 862, 877 . . . (1983). The Cartwright court recognized that if "an aggravating circumstance is defined and applied so broadly that it conceivably could cover every first degree murder, then it obviously cannot fulfill its

> constitutional responsibility to eliminate the consideration of impermissible factors and to provide a recognizable and meaningful standard for choosing the few who are to die." Cartwright, 822 F.2d at 1485, quoting Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases--The Standardless Standard, 64 N.C.L.Rev. 941, 954 (1986).

Newlon v. Armontrout, 693 F.Supp. 799, 813 (W.D. Mo. 1988) (holding that failure of trial court to provide a clear, limiting directive for "depravity of mind" required finding term unconstitutionally vague), appeal pending, No. 88-2385 (8th Cir.).

Unlike the circumstances at issue in Cartwright and Newlon, the aggravating circumstance herein does not require a narrowing construction because the terms contained "are commonly understood, interpreted and applied." Newlon, supra, 693 F.Supp. at 813. They are, therefore, capable of objective determination without a limiting

directive being provided by the trial court to the jury. See, Maynard v. Cartwright, 108 S.Ct. 1853, 1858 (1988). Griffin's federal habeas ground 16 should be denied.

Because the record clearly demonstrates that Griffin is not entitled to federal habeas relief on his grounds 2, 4, 7, 8, 10, 11, 12 and 16, an evidentiary hearing is not now required. In sum, these grounds should be denied.

RECOMMENDATION

For the reasons set forth above, it is the recommendation of the undersigned United States Magistrate that petitioner's federal habeas grounds 1, 5, 6, 9, 14 and 15 be barred from review by the Court in this proceeding. It is further recommended that petitioner's grounds 3, 13, and 17 be dismissed by the Court for failure to raise any

constitutional claim. It is further recommended that petitioner's grounds 2, 4, 7, 8, 10, 11, 12 and 16 be denied on their merits. Finally, petitioner's request for an evidentiary hearing should be denied. The parties are advised that they have twenty (20) days in which to file written objections to this Report and Recommendation.

--David D. Noce--

UNITED STATES MAGISTRATE

Signed this 27th day of September, 1989.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2377EMSL

Larry Griffin,	*	
	*	
Appellant,	*	
	*	Order Denying
vs.	*	Suggestion for
	*	Rehearing En
Paul Delo,	*	Banc
	*	
Appellee.	*	

The suggestion for rehearing en banc is denied. Judge Fagg, Judge Bowman, and Judge Hansen would grant the suggestion.

A separate order will be entered with respect to the petition for rehearing by the panel.

March 24, 1992

Order Entered at the Direction of the Court:

--Michael E. Gans--

Clerk, U.S. Court of Appeals,

Eighth Circuit

91-1782

Supreme Court, U.S.
FILED
MAY 4 1992
OFFICE OF THE CLERK

No. 91-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

PAUL DELO,

Petitioner,

vs.

LARRY GRIFFIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI VOLUME II

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

LARRY GRIFFIN,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. 91-_____
	)	
PAUL DELO,	)	
	)	
Petitioner.	)	

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LARRY GRIFFIN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No.: 88-1074C(2)
	)	
BILL ARMONTROUT,	)	
	)	
Respondent.	)	

PETITIONER'S FIRST AMENDED PETITION UNDER 28 U.S. SEC. 2254 FOR WRIT OF HABEAS CORPUS

Comes now petitioner, by and through his court appointed counsel, Daniel Gralike, and for his First Amended Petition Under 28 USC §2254 for Writ of Habeas Corpus, states as follows:

INTRODUCTION

Larry Griffin was charged by indictment with Capital Murder in Violation of Section 565.001 R.S. Mo.(1978). On June 26, 1981, after trial by jury in the Circuit Court of the City of St. Louis, Honorable James J. Gallagher, presiding, Larry Griffin

was convicted of Capital Murder. The jury recommended death as punishment.

During trial, appellant was represented by Frederick Steiger, private counsel. On August 7, 1981, the Honorable James J. Gallagher sentenced Larry Griffin to death by lethal gas. Larry Griffin timely appealed his conviction to the Supreme Court of Missouri alleging eight (8) points of error. On December 20, 1983, the Supreme Court of Missouri affirmed Larry Griffin's conviction and sentence by a divided Court. State v. Griffin, 662 S.W. 2d 854 (Mo. en banc 1983).

On November 16, 1984, Larry Griffin filed his pro se motion for post conviction relief pursuant to Supreme Court Rule 27.26, three subsequent amendments to Larry Griffin's pro se 27.26 motion were filed. As evidentiary hearing was held relative to

Griffin's 27.26 motion on October 31, 1986, before the Honorable Edward M. Peek, Twenty-Second Judicial Circuit. On February 23, 1987, Judge Peek overruled Larry Griffin's Rule 27.26 claim. Griffin timely appealed Judge Peek's order denying relief under Rule 27.26 to the Missouri Court of Appeals, Eastern District. On February 16, 1988, the Missouri Court of Appeals affirmed the judgment of Judge Peek's order.

Griffin timely filed his Motion for ReHearing or, in the Alternative, for Transfer to the Supreme Court of Missouri in the Missouri Court of Appeals on March 2, 1988.

On June 3, 1988, Larry Griffin filed his pro se Petition for Habeas Corpus in the United States District Court, Eastern District of Missouri. On January 26, 1989, the United States

Magistrate David D. Noce issued his order sustaining Larry Griffin's motion to substitute counsel and appoint present counsel, Daniel Gralike, as counsel.

GROUNDS AND SUPPORTING FACTS UPON WHICH PETITIONER IS BEING HELD UNLAWFULLY

Petitioner's rights guaranteed by the Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments were violated on the following grounds.

GROUND ONE:

Petitioner was denied his constitutional rights, including his 6th Amendment right, to "be confronted with the witnesses against him," when the trial court overruled trial counsel's objection to, an in admitting into evidence over said objection, the testimony of State's witnesses, Police officers Thomas Murphy and Nick Frederickson, recit-

ing statements purportedly made to them by one Robert Campbell, in that said testimony was inadmissible hearsay.

GROUND TWO:

Petitioner's trial counsel, Frederick Steiger, was ineffective in that he utterly failed to contact, interview, guestion, or call Robert Campbell as a defense witness. Had trial counsel contacted, conversed, and called Robert Campbell as a witness, Campbell would have conclusively refuted the hearsay testimony of state witness Police Officer Thomas Murphy concerning the purported Campbell statements linking Petitioner to an alleged prior attempted assassination of Quintin Moss.

GROUND THREE:

Petitioner was denied his constitutional rights, including his rights to due process of law, when the trial court overruled trial counsel's objec-

tion to, and in admitting into evidence over said objection, the testimony of state's witness Missouria Moss, regarding verbal threats she heard from unknown individuals on the telephone in that said evidence was inadmissible hearsay and prejudicial for reason that the state failed to establish any connection between the alleged threatening telephone calls and the Petitioner.

GROUND FOUR:

Petitioner's trial counsel was ineffective in failing to properly and timely object to the testimony of State's witness Missouria Moss concerning verbal threats she received from unknown individuals over the telephone because said evidence was inadmissible hearsay and prejudicial.

GROUND FIVE:

Petitioner was denied his constitutional rights, including his rights to

due process of law, when the trial court improperly instructed the jury regarding the proof required to find the Petitioner guilty as a co-participant in the crime charged. Under the terms of the verdict director Instruction No. 6, if another person caused the death of Quintin Moss by shooting him with no act, assistance, or involvement of any kind by the petitioner, there could be a conviction.

GROUND SIX:

Petitioner's trial counsel rendered ineffective assistance of counsel when he failed to timely object to the State's verdict directing instruction, Instruction No. 6, and in failing to properly preserve this issue for review in his Motion for New Trial.

GROUND SEVEN:

Petitioner's trial counsel was ineffective at the punishment phase of

petitioner's capital murder trial in that he failed to present any mitigating evidence on petitioner's behalf.

GROUND EIGHT:

Petitioner's trial counsel was ineffective during the voir dire stage of trial in failing to question the jury panel whether they would automatically impose a sentence of death after a finding of capital murder.

GROUND NINE:

Petitioner's trial counsel was ineffective during the voir dire stage of trial in failing to attempt to rehabilitate jury panel members who had been disqualified as opponents to the death penalty.

GROUND TEN:

Petitioner's trial counsel was ineffective in failing to properly investigate petitioner's alibi defense.

GROUND ELEVEN:

Petitioner's trial counsel was ineffective during trial in that he failed to properly advise petitioner as to his right to testify during the penalty phase of trial.

GROUND TWELVE:

Petitioner was denied his constitutional rights, including his rights to due process of law, in that the trial prosecutor and/or other state authorities, engaged in prosecutorial misconduct in that during trial the State knowingly declined to utilize the immediately available testimony of Robert Campbell, but preferred the perjured testimony of police officer Thomas Murphy in the form of hearsay as to what Campbell purportedly said.

GROUND THIRTEEN:

That the cumulative effect of petitioner's trial counsel's errors, as aforesaid, deprived petitioner of the

right to effective assistance of counsel and the right to a fair and impartial trial during the guilt and punishment stages of trial, thereby depriving petitioner of his Fourth, Fifth, Sixth, and Fourteenth Amendment rights.

GROUND FOURTEEN:

Petitioner was denied his rights to the equal protection and due process of law by the admission of evidence during trial of alleged prior criminal conduct as articulated under GROUNDS ONE and TWO herein, and as a result of the trial prosecutor's repated innuendo of petitioner's evil character to establish a propatibility of guilt.

GROUND FIFTEEN:

Petitioner's trial counsel was ineffective in failing to properly object to the state's evidence and characterization of petitioner as a "Police Character".

GROUND SIXTEEN:

Petitioner was denied his constitutional rights, including his rights to equal protection and due process of law in that the Missouri statutory provisions, as applied, were unconstitutional in that the sole aggrevating circumstance in Petitioner's case was overly broad in its application and allowed the arbitrary and capricious imposition of the death penalty.

GROUND SEVENTEEN:

That the imposition of the death penalty against petitioner constitutes cruel and unusual punishment in violation of the rights secured by the Eighth Amendment of the United States Constitution, and Article I, Section 21 of the Missouri Constitution; that the sentence of death was imposed under the influence of passion, prejudice, and other arbitrary factors.

PRAYER OF RELIEF

WHEREFORE, the grounds and premises considered, petitioner prays for the following relief.

1. That this Court hold the sentence of death imposed upon petitioner and the conviction on which that sentence rests void and of no effect;

2. That the Court issue a writ of habeas corpus to have petitioner brought before it so that he may be discharged from his unconstitutional confinement and restraint, and relieved from his unconstitutional sentence of death;

3. That the Court conduct on evidentiary hearing for the purpose of providing Petitioner the opportunity to adduce supporting evidence of the grounds stated therein;

4. That the Court enter an Order, pursuant to Rule 6 of the rules

governing Title 28 U.S.C. Section 2254, that the petitioner be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedures;

5. That the Court continue to stay Petitioner's execution pending final disposition of the Amended Petition, pursuant to Title 28 U.S.C. Sec. 2251;

6. That the Court grant such further relief as may be deemed appropriate.

Respectfully yours,
--DANIEL J. GRALIKE--#32734
Attorney for Petitioner
8008 Carondelet, Suite 106
Clayton, MO 63105
(314) 863-5880

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

IN THE UNITED STATES DISTRICT COURT

EIGHTH DISTRICT

Name: Larry Griffin

Prisoner No.: CP10

Case No: 88-1708-C-2

Place of Confinement: DEATH ROW
Missouri State Penitentiary
Jefferson City, MO 65101

Name of Petitioner: (include name under which convicted) LARRY GRIFFIN v.
Name of Respondent: (authorized person having custody of petitioner): WILLIAM

ARMONTROUT, WARDEN, DEPARTMENT OF CORRECTIONS, JEFFERSON CITY, MO 65101

The Attorney General of the State of:

MISSOURI 88-1074-C-2

PETITION

1. Name the location of court which entered the judgment of conviction under attack CIRCUIT COURT OF THE CITY OF ST. LOUIS, MO.

2. Date of judgment of conviction: JUNE 26, 1986

3. Length of sentence: DEATH

4. Nature of offense involved (all counts): CAPITAL MURDER, DEATH

5. What was your plea? (Check one)

(a) Not guilty [X]

(b) Guilty [_]

(c) Nolo Contendre [_]

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

---

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

(a) Jury [X]

(b) Judge only [_]

7. Did you testify at the trial?

Yes [_] No. [XX]

8. Did you appeal from the judgment of conviction?

Yes [XX] No. [_]

9. If you did appeal, answer the following:

(a) Name of court:
MISSOURI SUPREME COURT

(b) Result: SPLIT DECISION,
JUDGMENT AFFIRMED

(c) Date of result and citation, if known: DECEMBER 20, 1983
662 S.W.2nd 854

(d) Grounds raised: 8 points of error.

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court: n/a

(2) Result: n/a

(3) Date of result and

citation, if known:

n/a

(4) Grounds raised: n/a

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court: n/a

(2) Result: n/a

(3) Date of result and citation, if known:

n/a

(4) Grounds raised: n/a

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this

judgment in any court, state or federal?

Yes [x] No [_]

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court: Circuit Court of the City of St. Louis, Mo

(2) Nature of proceeding: Rule 27.26 to set aside or vacate sentence for ineffective assistance of counsel at trial

(3) Grounds raised: 30 separate allegations

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes [XX] No [_]

(5) Result:

Petition denied,
Division #18

(6) Date of result:

Affirmed by the
Missouri Court
of Appeal, E.D.
2/16/88 No. 52998
also affirmed
by the Missouri
Supreme Court on
5/21/88

(b) As to any second petition, application or motion give the same information:

(1) Name of court: n/a

(2) Nature of proceeding:
n/a

(3) Grounds raised: n/a

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes [_] No [_] n/a

(5) Result: n/a

(6) Date of result: n/a

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc.

Yes [x] No. [_]

(2) Second petition, etc.

Yes [_] No. [_]

(d) If you did *not* appeal from

the adverse action on any petition, application or motion, explain briefly why you did not: n/a

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: The improper admission into evidence during trial of testimony concerning: a) alleged threatening telephone calls to the decendent's family b) Hearsay statements of police officers concerning May 31, shooting

Supporting FACTS (state *briefly* without citing cases or law) At trial evidence was adduced that the family of

the decedent's family receiving threatening phone calls without linking said threats to petitioner: police officer Frederickson testified at trial about statements he heard form one Robert Campbell concerning a 5/31/80 shooting. Campbell later testified at petitioner's 27.26 hearing that he never said such to the officer.

B. Ground two: Petitioner was denied effective assistance of counsel in violation of his 6th and 14th amendment rights under the United States Constitution for reason that:

Supporting FACTS (state *briefly* without citing cases or law): a) counsel failed to contact an essential witness, Robert Campbell despite repeated requests to do so by petitioner and his family, b) trial counsel failed to present any mitigation evidence on be-

half of petitioner, c) counsel failed to adequately voir dire the jury panel concerning the death penalty, d) counsel for petitioner failed to proper advise petitioner of his right to testify during trial, 3) counsel failed to properly investigate petitioner's alibi defense.

C. Ground three: The Missouri Court of Appeals, E.D., ignored prevailing case law concerning the admissibility of threatening telephone calls not linked to the defendant.

Supporting FACTS (state *briefly* without citing case or law): The Missouri Court of Appeals, E.D., held that the failure of the state (during Trial) to offer evidence connecting these telephone threats to the petitioner renders

the testimony harmless. (At Page 11 of Opinion).

D. Ground Four: Prosecutorial Misconduct

Supporting FACTS (state *briefly* without citing cases or law): At trial the State of Missouri endorsed and subpeoned Robert Campbell. Campbell had been present at an earlier shooting attempt allegedly on the decedent, Quinton Moss. The state at trial attempted to link petitioner to the earlier shooting with statements purportedly made by Campbell immediately after this earlier shooting to police officers. On the day of trial, Campbell appeared pursuant to the state issued subpeona and informed the state that the information contained in the police officer's report was inaccurate. Thereafter, Campbell was told to leave by the

state, and the state then proceeded to adduce at trial the knwon false statements by way of the P.O.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

---

14. Do you have any petition or appealnow pending in any court, either state or federal, as to the judgment under attack? Yes [_] No [xx]

15. Give the name and address, if known, of each attorney who represented you in the following

stages of the judgment attacked herein:

(a) At preliminary hearing: Grand Jury.

(b) At arraignment and plea Frederick Stieger P.C. St. Louis

(c) At trial Frederick Stieger, P.C.

(d) At sentencing Frederick Stieger, P.C.

(e) On appeal Frederick Stieger, P.C.

(f) In any post-conviction proceeding: Office of the Public Defender, St. Louis County and Robert Paskal,

P.C., and Daniel J. Gralike P.C.

(g) On appeal from any adverse ruling in a post-conviction proceeding: Daniel J. Gralike P.C., 8008 Carondelet, 211 Clayton, Mo. 63105 (314) 863-5005

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes [_] No [xxx]

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes [_] No [x]

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) Give date and length of the above sentence: _____

_____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes [_] No [x]

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 31, 1988
(date)

--Larry Griffin--
Signature of Petitioner

SUPREME COURT OF MISSOURI

en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. 63315
	)	
LARRY GRIFFIN,	)	
	)	
Appellant.		

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
Division No. 20
Honorable James J. Gallagher, Judge

Defendant Larry Griffin, 26 years old at the time of trial, was convicted of the capital murder of Quintin Moss by a jury in the Circuit Court of the City of St. Louis and sentenced to death. He seeks reversal, contending there was prejudicial error in the court's instructions to the jury and in admitting certain evidence in the guilt phase of his trial. He also avers prejudicial error was committed in the reception of other evidence at the penalty stage of the trial and that the

death penalty violates the Federal Constitution. We affirm.

Although defendant does not directly attack the sufficiency of the evidence to support his conviction, we think it helpful in considering his several points to set forth in some detail the facts and reasonable inferences arising therefrom which the jury could reasonably have found in arriving at their verdict, ignoring contrary evidence and inferences. State v. Franco, 544 S.W.2d 533 (Mo. banc 1976), cert. denied, 431 U.S. 957 (1977).

Quintin Moss, a 19-year-old black male, lived with his parents in St. Louis. The record in this case leaves little room for doubt that he was involved in the illicit trafficking of drugs and that he plied his illegal trade near the intersection of Sarah

and Olive Streets in St. Louis, six blocks from his parent's place of abode.

Defendant, a black male, was the brother of Dennis Griffin. Reginald Griffin was a nephew of defendant and Dennis. Prior to the killing of Quintin Moss, the defendant and Reginald lived together with defendant's sister.

In the early hours of January 2, 1980, Quintin Moss and Dennis Griffin arrived at the Moss apartment, awaking Mr. and Mrs. Moss by knocking on the door and ringing the doorbell. Following an argument between Quintin and his father, the latter objecting to his son's bringing "that kind of person home with him", Dennis departed the premises. A short time later he was killed in an alley behind the Moss apartment. About a week later Quintin Moss was arrested for this killing but

subsequently released by the authorities. Thereafter, according to Mrs. Moss, she was the recipient of telephoned threats against her son's life because of the killing of Dennis Griffin. She opined the unidentified telephone caller was a "black male".

May 13, 1980: At about 2:00 or 2:15 in the afternoon, Quintin Moss and Robert Campbell, a black male, were together near the intersection of Sarah and Olive Streets. About 2:30 p.m. a black over brown older model Cadillac automobile, occupied by two black males, drove up and stopped. One of the occupants stepped out of the vehicle and fired four or five pistol shots in the direction of Quintin Moss and Robert Campbell, one bullet striking and wounding Campbell. The Cadillac, containing the two unidentified black males, then sped away. A short time

later Quintin Moss was seen beneath his bicycle at the scene of the shooting.

Mrs. Moss was at her home when she saw her son ride up on his bicycle. Quintin was visibly disturbed and upset and exclaimed he had just been shot at and showed her a dent on his new bicycle. He asked his mother to take him back to the scene of the shooting and she did so.

At about 3:00 p.m., a police officer saw defendant and Reginald Griffin in a black over brown 1968 Cadillac automobile about three miles from the shooting scene. Reginald was driving the vehicle. When the officer, driving an unmarked police car, pulled up along side the Cadillac and displayed his badge, the Cadillac accelerated and drove away. A chase ensued for some distance before the police officer's car and another detective's car forced

the Cadillac to a stop. Reginald Griffin was arrested for multiple traffic violations. No weapons were found.

June 26, 1980: Officer Jones, off duty at the time, was driving past 3656 Cook Street at about 4:00 p.m. He saw three black males near the house. He recognized defendant ("known to be a police character"), a second person wearing a red and white baseball cap, and a third person carrying what appeared to the officer to be a shotgun. Because of heavy traffic, Officer Jones was delayed in circling the block to investigate what he had observed. By the time he returned, the three men had disappeared.

State's witness Robert Fitzgerald, a white male, was standing beside his car at about 4:30 p.m. near the intersections of Sarah and Olive Streets while two other men were attempting to

repair it. Fitzgerald had earlier observed Quintin Moss in the vicinity and concluded Moss was engaged in selling narcotics. Moss was standing on the sidewalk near Fitzgerald's car when Fitzgerald saw a faded blue 1967 or 1968 Chevrolet drive up and stop behind his car. There were two black males in the front seat and a third in the rear seat. There was a burst of gunfire from the Chevrolet and Fitzgerald saw the defendant firing a pistol through the open window of the passenger side of the front seat of the car. The person in the rear seat was firing a semi-automatic rifle. The direction of the shots was towards Moss and he was struck 13 times by bullets. A passer-by, Wallace Connors, was struck in the buttocks by one of the bullets. Fitzgerald had an unobstructed view of the defendant throughout the shooting

and as the Chevrolet drove away. Fitzgerald saw the license plate on the rear of the car and memorized the number. He provided this information to the police and accompanied the officers to the police station where he identified defendant from a group of photographs as being the person firing the pistol from the front seat of the Chevrolet. A short time later Fitzgerald identified the Chevrolet as the vehicle which had been at the scene of the killing.

The 1968 Chevrolet was parked behind an apartment building and was unoccupied. In the vehicle the officers found a .30 caliber semi-automatic rifle, which contained a clip containing seven live rounds of ammunition, empty rifle shell casings, a .38 caliber revolver, a red and white baseball cap, and a court receipt bearing the name

"Reginald Griffin". When fully loaded the clip for the carbine would hold 31 rounds of ammunition. There was expert testimony that a bullet fragment found at the scene of the killing of Quintin Moss had been fired by the carbine, which Officer Jones testified was similar in appearance to the firearm one of the black males was carrying at the Cook Street address about 4:00 p.m. Officer Jones also testified the red and white cap was similar to the one he saw being worn by one of the two unidentified black males earlier. A .38 caliber bullet fragment found at the shooting scene was of the same general classification of the revolver found in the Chevrolet. Fitzgerald testified this revolver was similar to the one he saw defendant firing at Moss.

Defendant first asserts[1] that "the trial court committed prejudicial error in not properly instructing the jury regarding the proof required to find defendant guilty as a coparticipant in the charged events because the verdict director instruction failed to conform to the required MAI-CR 2d form in that the first paragraph of the verdict director instruction contained language significantly different than that prescribed in MAI-CR 2d 2.12."

Instruction No. 6 reads as follows:

> "If you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or about June 26, 1980 in the City of St. Louis, State of Missouri, the defendant or another

---

[1]In considering defendant's various points, the writer has borrowed liberally from the Per Curiam opinion handed down on June 30, 1983.

person caused the death of Quintin Moss by shooting him, and

Second, that the defendant and another person intended to take the life of Quintin Moss, and

Third, that the defendant and another person knew that they were practically certain to cause the death of Quintin Moss, and

Fourth, that the defendant and another person considered taking the life of Quintin Moss and reflected upon this matter coolly and fully before doing so,

then you are instructed that the offense of capital murder was committed, and if you further find and believe from the evidence beyond a reasonable doubt:

Fifth, that in the commission of such offense the defendant acted with such other person with the purpose of committing that offense,

then you will find the defendant guilty of capital murder.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense."

This case was tried in June 1981. Instruction No. 6 should have been in the form prescribed in MAI-CR 2d 2.12, effective January 1, 1979. However, the giving of Instruction No. 6 by the trial court was not prejudicial error. Instruction No. 6 followed the MAI-CR 2d 2.12 form adopted by Order of this Court entered April 14, 1981. That Order provided that the form adopted on said date "must be used on and after January 1, 1982, and may be used prior thereto and any such use will not be presumed to be in error."

Defendant next contends that "the trial court committed prejudicial error in refusing to give MAI-CR 2d 3.42 the circumstantial evidence instruction as requested by defense counsel because said instruction was appropriate in defendant's case and proper under the applicable case law and MAI Notes on

Use in that the bulk of the evidence presented at trial was circumstantial and much of the evidence was of a conflicting and inconsistent nature and MAI-CR 2d 3.42 would greatly have aided the jury in properly evaluating the evidence." Defendant concedes that both direct and circumstantial evidence were presented. "Where the evidence, as here, is partially direct and partially circumstantial, it is not necessary to give a circumstantial evidence instruction and the test as to submissibility is not that of a purely circumstantial evidence case." State v. Baldwin, 571 S.W.2d 236, 240 (Mo. banc 1978). The point is denied.

Defendant continues that "the trial court abused its discretion in denying defendant pre-trial motion in limine and in admitting over defendant's renewed objection at trial testimony

regarding the assault on Robert Campbell because said testimony was irrelevant and its probative value was outweighed by its inflammatory and prejudicial nature in that said evidence did not prove or disprove any fact in issue in this cause, none of the testimony presented either linked the assault on Campbell to appellant or to the charged crime herein, and that the testimony only served to draw the jury's attention away from the factual issues that it was called upon to resolve and thereby hinder the jury's ability to decide the principal case upon its merits."

From the circumstantial evidence about which defendant complains, a rational finder of fact could have concluded that defendant attempted to kill Quintin Moss on May 13, 1980, as Moss and Campbell stood within a few feet of the intersection of Sarah and Oliver.

"Relevant evidence is not inadmissible because it is prejudicial." State v. Wood, 596 S.W.2d 394, 403 (Mo. banc), cert. denied, 449 U.S. 876 (1980).

The firing on Campbell, standing alone, would not be relevant and would therefore be inadmissible. But the evidence surrounding the May 13 event involved Quintin Moss, and Campbell was merely incidentally involved as was Wallace Connors in defendant's June 26, 1980, successful effort to "get" Moss.

The relevancy of the evidence is thus to show a common scheme or plan and would therefore not be inadmissible because of its disclosure of another crime. State v. Williams, 652 S.W.2d 102, 110 (Mo. banc 1983); State v. Shaw, 636 S.W.2d 667, 671 (Mo. banc 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 239 (1982). In fact, this situation bears many of the marks of State

v. White, 621 S.W.2d 287, 294-95 (Mo. 1981), in which a victim's excited utterance of a prior attempt on her life was acceptable as part of a continuing scheme to kill her. Admittedly, the facts here do not present the strongest possible case. But the admission of the May 13 attack is not prejudicially erroneous.

The salient facts of the May 13 incident are as follows: Police responded to a shooting report at Sarah and Olive and found a bleeding and dazed Robert Campbell. Quintin Moss was beside him. Campbell related that a black over brown "older Cadillac" carrying two negro males stopped. One of the occupants alighted and fired several shots from a gun, one of which struck Campbell in the leg.

Within a half hour of the May 13 attack in which Campbell was wounded,

police spotted Reginald and Larry Griffin in a black over brown 1968 Cadillac about three miles from the point of assault. Reginald was driving. When the Cadillac occupants observed police, they sped away to be caught shortly thereafter in a high speed chase. Both Reginald and Larry were inside the vehicle when ultimately stopped.

The fact that the black over brown Cadillac was found to be with only two doors rather than four doors as initially reported is not critical; the jury can assess that matter. Nor does the general description of the vehicle as given provide less reason for the police to be substantially suspicious, give chase and stop. State v. Carter, 572 S.W.2d 430, 435 (Mo. banc 1978) and State v. Clark, 607 S.W.2d 817, 819-20 (Mo.App. 1980) provide ample basis for

the admission of evidence regarding the Cadillac despite the minor discrepancies concerning its description. It was close enough in time, proximity and identity to allow its part in the episode to be given substantial billing.

Mrs. Moss related through the exicted utterance of her son Quintin that he was the intended victim of a shooting shortly after its occurrence. Under the facts as related, Quintin's statement that he "just had been shot at" qualifies for admission as an excited utterance. State v. White, 621 S.W.2d at 295; State v. Rogers, 585 S.W.2d 498, 504 (Mo.App. 1979). The jury could reasonably find that the statement was uttered shortly after an unusual occurrence while Quintin was under the effects of the episode and in an uncontrolled state of mind.

In State v. Van Orman, 642 S.W.2d 636 (Mo. 1982), at 639, we said:

> The essential test for admissibility of a spontaneous statement or excited utterance is neither the time nor place of its utterance but whether it was made under such circustances as to indicate it is trustworthy. The rationale of this exception to the hearsay rule is that where the statement is made under the immediate and uncontrolled domination of the senses as a result of the shock produced by the event, the utterance may be taken as expressing the true belief of the declarant. State v. Rogers, 585 S.W.2d 498 (Mo.App. 1979).

Under the evidence presented, we hold that both the statement of Robert Campbell and that of Quintin Moss were admissible as spontaneous statements or excited utterances. Considered together, they demonstrate a common scheme or plan to kill Quintin Moss and circumstantially point to the defendant. We find no prejudicial error.

Defendant contends that "the trial court committed prejudicial error in overruling defense counsel's objection to and admitting into evidence over said objection the testimony of state's witness Missouria Moss repeating verbal threats she heard from unknown individuals over the telephone because said evidence was inadmissible hearsay in that it was in court testimony of an extra judicial statement that was offered to prove the truth of the matters asserted therein."

First of all, the record discloses a proper and timely objection was not made by defendant to the question, nor was there a proper motion made to strike Mrs. Moss' answer. Further, there was no ruling by the court on defendant's tardy objection. Consequently, the point is not preserved for

our review. Plain error review is not warranted. The point is denied.

Defendant next asserts that "the trial court committed prejudicial error in overruling defense counsel's objection to and admitting into evidence over said objection the testimony of state's witness Missouria Moss reciting statements made to her by her son Quintin Moss because such evidence was inadmissible as hearsay and was not within the excited utterance exception to the hearsay rule in that the statement was not made under the immediate and uncontrolled domination of the senses as a result of the shock produced by the event and therefore the utterance was not sufficiently trustworthy to be admitted as an exception to the hearsay rule."

As indicated, supra, we are of the opinion that Quintin Moss' statement to

his mother falls within the spontaneous statement or excited utterance exception to the hearsay rule, and, therefore, admissible. State v. Van Orman, supra.

Defendant claims that "the trial court committed prejudicial error in overruling defendant's motion to strike from the transcript herein portions of the pre-sentence investigation read into the record by the trial court at the time of sentencing because the information that was read into the record was irrelevant and highly prejudicial to the defendant in that it concerned matters occurring subsequent to the jury's determination as to guilt and punishment in this cause."

The information read into the record is pertinent to our determination "[w]hether the sentence of death is excessive or disproportionate to the

penalty imposed in similar cases, considering both the crime and the defendant." Section 565.014, RSMo 1978. See Banks v. State, 237 Ga. 325, 227 S.E.2d 380 (1976). The point is denied.

Defendant avers that "the trial court abused its discretion in overruling defense counsel's objection to and admitting into evidence over said objection during the punishment determination portion of defendant's trial three close-up eight by ten inch color photographs of the wounds suffered by the victim in this cause because the prejudicial and inflammatory impact of these photographs greatly outweighed their probative value in that these photographs were entirely cumulative in nature as extensive testimony had been presented at trial detailing the number, nature, location, and type of wounds received by the victim and the

jury had already viewed a photograph of the victim's body showing said wounds."

The trial judge stated into the record that he believed the photographs were pertinent to the statutory aggravating circumstance which the state was required to prove beyond a reasonable doubt. See § 565.012.2(3), RSMo 1978. We agree. The point is denied.

Defendant finally contends that "the imposition of the death penalty in this case constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments to the Constitution of the United States because the statutory aggravating circumstance applied herein is unconstitutionally vague both on its face and as applied in that it is susceptible to widely differing interpretations thereby causing the death penalty to be imposed in an arbitrary and capricious manner."

The statutory aggravating circumstance found presented in this case by the jury was that the accused "by his act of capital murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person. . . ." Section 565.012.2(3), RSMo 1978.

In Liverpool, New York and Philadelphia S. S. Co. v. Commissioners v. Emigration, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899 (1885), the United States Supreme Court warned against a court formulating "a rule of constitutional law broader than is required by the precise facts to which it is applied."

In Godfrey v. Georgia, 446 U.S. 420, 428 (1980), the United States Supreme Court held "that if a State wish-

es to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty."

Mindful of the Liverpool caution, and of the Godfrey constraint, we confine our holding to the facts in this particular case. According to the evidence, defendant created "a great risk of death" to at least seven persons by means of weapons sufficiently hazardous to strike the body of Quintin Moss thirteen times and to wound Wallace Connors. In our view, the finding by the jury of the statutory aggravating circumstance is constitutionally permissible.

Section 565.014.1, RSMo 1978, also mandates that this Court determine whether "the sentence of death was imposed under the influence of passion,

prejudice, or any other arbitrary factor. . ." The record demonstrates that the death sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor.

Finally, § 565.014.1, RSMo 1978, mandates that this Court determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." This is the first case in which this Court has reviewed the imposition of the death penalty on the basis of the aggravating circumstance specified in § 565.012.2(3), RSMo 1978. Those cases in which both death and life imprisonment were submitted to the jury and which have been affirmed on appeal have been reviewed. State v. Mercer, 618 S.W.2d 1, 11 (Mo. banc), cert. denied, 454 U.S. 933 (1981). They do not point

to excessiveness or disproportionality in the sentence in this case.

The judgment is affirmed.

William H. Billings, Judge

Rendlen, C.J., Welliver, Higgins, Gunn and Donnelly, JJ., concur; Blackmar, J., dissents in separate opinion filed.

Execution date set for February 2, 1994.

SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. 63315
	)	
LARRY GRIFFIN,	)	
	)	
Appellant.	)	

DISSENTING OPINION

Judge Billings' able opinion deals correctly with most of the issues in this case, which was generally well tried. I regret that I cannot join in the affirmance, but I believe that the defendant was improperly burdened by evidence, which should not have been admitted, of the May 13, 1980 shooting involving Robert Campbell. The only eyewitness to the murder had a seriously flawed background, and his ability to observe and identify the gunman was also subject to question. The error, then, was prejudicial, and the only solution is a new trial.

I.

The principal opinion properly observes that, in a capital murder case, evidence of a prior attempt by the defendant on the victim's life is highly relevant in showing a continuing scheme or plan and in establishing the element of deliberation. By the same token, however, evidence which indicates the defendant's involvement is highly prejudicial if the defendant is not sufficiently tied into the prior attempt. There have been numerous reversals because the prosecution offered evidence of prior and relevant criminal conduct, without sufficiently tying the defendant into the prior offenses.[1]

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[1]State v. Hancock, 451 S.W.2d 6 (Mo. 1970); State v. Strickland, 530 S.W.2d 736 (Mo. App. 1975); State v. Crane, 559 S.W.2d 294 (Mo. App. 1977);
(Footnote Continued)

A lesson from the pages of history should be helpful. The famous case of State v. Hyde, 234 Mo. 200, 136 S.W. 316 (1911), involved a charge of murder of Colonel Thomas Swope, longtime resident of Jackson County and civic benefactor. The defendant, a physician, was his nephew by marriage. The prosecution claimed that Dr. Hyde had hastened Colonel Swope's death by deliberately prescribing medication which produced a lethal accumulation of arsenic. In an effort to bolster its case the prosecution tried to show that the defendant had used his medical knowledge in an effort to kill other members of the Swope family, by excessive bleed-

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(Footnote Continued)
State v. Lamb, 468 S.W.2d 209 (Mo. 1971). State v. Reese, 364 Mo. 1221, 1227, 275 S.W.2 304, 307 (1954), mentions the "dangerous tendency" of this kind of evidence.

ing of a stroke victim, and by introducing typhoid germs into food or water. The suggested motive was to increase his wife's inheritance. This Court reversed the conviction because it concluded that the state had not established homicide or attempted homicide in regard to the other members of the family. The defendant, therefore, was burdened by improper innuendo in making his defense.

Nobody identified the defendant as the perpetrator of the May 13 shooting. The only link to him is Robert Campbell's hearsay statement that the gunman was riding in a black-over-brown four-door older Cadillac, and the defendant's presence as a passenger in a black-over-brown two-door Cadillac.

No eyewitness to the May 13 shooting even testified. The state relied entirely on the testimony of a police

officer who interviewed Campbell at the scene. Campbell had been wounded in the leg. He lost substantial blood and was in a dazed condition. He described the gunman's car in response to a police officer's question.

Although the admission of Campbell's statements as "excited utterances" goes beyond any reported Missouri case applying this particular exception to the hearsay rule,[2] the conclusion is in line with the liberal view of modern authorities such as the Federal Rules of Evidence.[3] The holding will permit

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[2]This descriptive statement goes well beyond those involved in such recent cases as State v. White, 621 S.W.2d 287, 294 (Mo. 1981); State v. Rogers, 585 S.W.2d 498, 504 (Mo. App. 1979; State v. Jones, 620 S.W.2d 17 (Mo. App. 1971); State v. Collins, 607 S.W.2d 712 (Mo. App. 1980).

[3]Rule 803(2), F.R.E. See 4 Weinstein's Evidence, ¶ 803.2[4] (1981).

the introduction of evidence both in civil and criminal cases which would have been rejected under the prior law. But I do not disagree strongly with the majority on this particular portion of the court's holding.

The problem is that the police officer who interviewed Campbell definitely committed himself to Campbell's description of a four-door automobile. It makes no difference that the officer did not disclose the number of doors on direct examination. He read from his report, and agreed that he got the number of doors from the witness. It is almost as though the prosecution hoped that the full description of the car would not come out. The problem here is one common to hearsay exceptions. The declarant's statements were immutable. There is no leeway for exploring matters of degree.

The car in which the defendant was riding as a passenger was photographed and found to have only two doors. This appears with definiteness and certainty. Even without this discrepancy, one might wonder whether the description by make and color would be sufficient, in the absence of testimony about the number of similar cars. Cf. State v. Greer, 655 S.W.2d 593 (Mo. App. 1983). But we need not pursue the point, because the police did not find the same vehicle that the wounded witness described.

The principal opinion holds that "the jury" may resolve the discrepancy. How can the jury have any possible basis for saying that Campbell was wrong in the description he gave the police, and really intended to describe a different car? Cases holding that variation in description is not fatal

to the existence of possible cause for stopping and searching a vehicle are not sufficient to supply the required connection for evidentiary purposes.[4] The police were undoubtedly justified in stopping the car in which the Griffins were riding, but this does not provide the link required before evidence of another crime can be admitted.

The state argued that it is not necessary to prove the required linkage beyond reasonable doubt. I do not disagree. The phrase, "reasonable doubt" is designed to be addressed to juries. The foundation for admission of evidence of other crimes is a question for

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[4]Cited are State v. Carter, 572 S.W.2d 430, 435 (Mo. banc 1978) and State v. Clark, 607 S.W.2d 817, 819-20 (Mo. App. 1980), both of which dealt with the lawfulness of searches rather than with admissibility of evidence.

the trial judge. Some substantial connection is necesessary, however, as our cases repeatedly hold. Here the connection is lacking and the evidence should not have been admitted.

The prejudice is enhanced by the admission of evidence of threats against the life of Quintin, following the killing of Dennis Griffin. These threats were not tied to the defendant, and there was no occasion for admitting them. Their admission, standing alone, might not be prejudicial, because the jury might be expected to perceive the absence of a link, but here the prosecution was trying to plant in the jury's mind the suggestion that the defendant sought revenge against his brother's suspected killer. In contrast to the principal opinion, furthermore, I find the hearsay objection sufficient. The unconnected threats were not admissible

for their own sake. State v. Hicks, 535 S.W.2d 308, 312 (Mo. App. 1976). The prosecution sought to establish by innuendo the homicidal purpose of the voice on the other end of the line, and to relate it to the killing of the defendant's brother. The objection sufficiently warned the trial judge of the problem and the prejudices.

But the primary error relates to the admission of the events of May 13. They are not relevant, because they were not connected up. The error is prejudicial.

II.

The defendant challenges the capital murder verdict director, Instruction 6, on grounds, among others, as follows:

> Under the terms of the verdict directing instruction as given if another person caused the death by shooting him with no act, assistance, or involvement of any kind by

> the defendant appellant Larry Griffin ...
>
> there could be a conviction. I do not believe that the principal opinion responds fully to this point.

This claim is supported by the language of the instruction. Under the instruction the jury could return a verdict of guilty if it were to find as follows:

> First, that the defendant or A caused the death of Quintin Moss;
>
> Second, that the defendant and B intended to take the life of Quintin Moss;
>
> Third, that the defendant and B knew they were practically certain to cause the death of Quintin Moss;
>
> Fourth, that the defendant and B considered taking the life of Quintin Moss and reflected on the matter coolly;
>
> Fifth, that in the commission of such offense the defendant acted with B for the purpose of committing that offense.

The complaint about Instruction No. 6 is well taken. There has been a serious problem in getting literate and

comprehensible instructions in capital murder cases, especially when more than one defendant is involved, and this Court has sustained instructions which are grammatical and rhetorical monstrosities, in addition to being legally ambiguous.[5] If the instruction here challenged had referred to "defendant and that other person" in the second, third, fourth and fifth hypotheses the fault would have been corrected. The defendant is entitled to instructions which are comprehensible.

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[5]State v. Betts, 646 S.W.2d 94 (Mo. banc 1983); State v. McIlvoy, 629 S.W.2d 333 (Mo. banc 1982); State v. Newlon, 627 S.W.2d 606 (Mo. banc 1982); State v. White, 622 S.W.2d 939 (Mo. banc 1981). It seems that, in an attempt to force instructions into the MAI-CR2d mold, prosecutors and judges have come up with instructions which violate both MAI and rules of ordinary good usage.

This error, however, was not pointed out in the motion for new trial. Allegation 15 of that motion refers to a variance between the instruction given and MAI. The principal opinion correctly resolves this issue.

It is appropriate to insist on specific objection to instructions. My preference would be for requiring objections before the instructions are given, in the manner of Rule 30 of the Federal Rules of Criminal Procedure. An objection only in the motion for new trial comes too late to do any real good, but it is a firm requirement of our Rule 28.03. After examining the closing arguments, I am confident that the genuine issues were properly presented and that the jury was not misled or confused by the instruction, and so am unable to say that there was plain error in giving it.

III.

Because of my conclusion that a complete new trial is required I do not reach the question of punishment. I do, however, have some observations.

The evidence showed a gangland-type assassination, with two gunmen firing semiautomatic weapons from a moving vehicle. The scene was a public street and the danger to more than one person was patent. I agree with the holding in the principal opinion that the evidence supports the aggravating circumstance found by the jury, that there is no indication that the jury acted out of passion or prejudice, and that the sentence is not out of line with other cases in which the death penalty has been assessed. If one believes in capital punishment, and if the trial were free from error, this

case would seem to be a particularly appropriate one.

On points not discussed I agree with the principal opinion. For the error described, however, the judgment should be reversed and the case remanded for a new trial.

CHARLES B. BLACKMAR, Judge

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

DIVISION TWO

LARRY GRIFFIN,	)	No. 52998
	)	
Plaintiff-Appellant,	)	Appeal from the
	)	Circuit Court of
	)	the City of St.
	)	Louis
vs.	)	
	)	Honorable Edward
	)	Peek
STATE OF MISSOURI,	)	
	)	OPINION FILED:
Defendant-Respondent.	)	
	)	February 16, 1988

Movant was convicted of the capital murder of Quintin Moss. After a jury trial he was sentenced to death. His conviction was affirmed on direct appeal in State v. Griffin, 662 S.W.2d 854 (Mo.banc 1983) which contains a detailed discussion of the murder. Movant subsequently filed a pro se Rule 27.26 motion and counsel was appointed. An evidentiary hearing on the allegations in movant's amended petition was held before Judge Edward M. Peek in the Circuit Court in the City of St.

Louis. The court issued "Findings of Fact and Conclusions of Law" denying the movant's petition for relief. Movant, on appeal, raises three points of error, all of which assert that his trial counsel rendered ineffective assistance.

Our review in this case is limited to a determination of whether the findings, conclusions and judgment of the trial court are clearly erroneous. Rule 27.26(j). The trial court's findings and conclusions are clearly erroneous only if a review of the entire record leaves the court with a definite and firm impression that a mistake has been made. Stokes v. State, 688 S.W.2d 19, 21 (Mo. App. 1985).

Since the majority of movant's points on appeal allege ineffective assistance of counsel, the guidelines enunciated in Strickland v. Washington,

466 U.S. 668 (1984) and Seales v. State, 580 S.W.2d 733 (Mo. banc 1979) must govern our decision. In order for a convicted defendant to succeed on a claim of ineffective assistance of counsel entitling him to a reversal of a death sentence he must show, first, that counsel's performance fell below the standard of reasonable effectiveness. Strickland, 466 U.S. at 687. In assessing the performance of counsel the courts recognize the wide latitude given to counsel in making tactical decisions and must be highly deferential. Further, the movant must overcome the strong presumption that his attorney's conduct fell within the wide range of reasonableness, and that the actions of the attorney are considered sound trial strategy. Id. at 689. Second, the movant must show that he was prejudiced by the alleged deficient

performance. Id. at 692. The pivotal inquiry when the movant challenges a death sentence is whether there is a reasonable probability that absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Id. at 695.

In his first point movant contends that he was denied effective assistance of counsel in that his trial counsel failed to interview and call as a witness Robert Campbell. Campbell was the unintended victim of a prior attempt on Moss' life. On May 13, 1980 police responded to a report of a shooting at Sarah and Olive streets. There they found a bleeding and dazed Robert Campbell. Quintin Moss was beside him. Campbell told police that a black over brown older Cadillac carrying two black males stopped. One of the occupants

got out of the car and fired several shots, one of which struck Campbell in the leg. Within a half hour of that shooting police spotted movant and his nephew in a black over brown 1968 Cadillac three miles from the scene of the shooting.

Campbell did not testify at trial but his statements concerning the May 13 incident were introduced via the testimony of the officers who arrived at the scene of the shooting. Movant now claims that had Campbell been called to testify at trial he could have refuted the testimony of the police officers and would have stated that he was unable to identify movant as the gunman. The hearing court found that the actions of trial counsel were strategical decisions and as such were not a proper basis for finding trial counsel ineffective. We agree.

The attorney who represented the state at movant's trial testified at the evidentiary hearing that he sought to have Campbell testify to this prior attempt in order to prove scheme, knowledge, intent and premeditation in the later shooting of Moss. It was hoped that this testimony would also identify the defendant as the gunman in the later incident. It was the state's position that Campbell had told officers who arrived on the scene of the May 13 shooting that a black and brown Cadillac carrying two black males stopped at Sarah and Olive streets. One of the occupants alighted and fired several shots from a gun, one of which hit Campbell. After Campbell was transported to the hospital, the police brought the defendant to Campbell's hospital room for identification. Campbell expressed fear of Griffin and declined to identi-

fy him as the gunman. Campbell was subpoenaed to testify at the trial but prior to trial he told investigators that he feared Griffin and would leave the courtroom if needed to avoid testifying. After a diligent search, the prosecuting attorney was unable to locate Campbell the day of trial.

Movant's trial counsel had represented movant on other matters in the past. At the evidentiary hearing counsel testified that from the time of movant's arrest until his trial, counsel met with movant in excess of twenty or twenty-five times. During the course of these meetings every detail of movant's case was discussed including the possible testimony of Robert Campbell. Counsel was aware of the existence and contents of the police reports concerning the May 13 shooting. In particular counsel was famil-

iar with the substance of the statements made by Campbell to the police. Counsel stated, however, that he was unaware that Campbell had, at any time, expressed fear of movant. Counsel stated that he did not contact Campbell or seek to have him testify at trial for the following reasons:

> . . . [I]t was pretty clear from the reports that were given to us what their basic case outline was going to be. Our defense was one of alibi. And our pre-trial in terms of how specifically we would formulate our defense, our concerns with Mr. Campbell was [sic] keeping him out of the courtroom rather than bringing him in .... [I]t was my feeling or our feelings --whatever-- that the best way to present the defense was to make it a clean and simple alibi defense. I felt that we had some very good, very strong witnesses on the alibi, and a good circumstantial basis for it. And what we were trying to do was to limit what I saw the State's efforts to make a nexxus [sic] of this whole common scheme. And what we were trying to do, and what we did pre-trial on the motions was to try and keep as much of this out on the basis that it had absolutely nothing to do with Larry.

In furtherance of this strategy counsel filed a pre-trial motion in limine to exclude Campbell's testimony. That motion was overruled. However, defense counsel, in anticipation of this event, had prepared a fall-back position. Upon cross-examination defense counsel would attempt to elicit testimony from Campbell that he was unable to identify Griffin as the gunman in the May 13, 1980 shooting. However, none of these strategies came to fruition because, although he had been subpoenaed, Campbell could not be found on the day of trial and did not testify.

Campbell, some six years later, testified at the evidentiary hearing regarding the circumstances surrounding the May 13, 1980 shooting. While he stated that his back was toward the car carrying the gunmen, the bullet that struck him entered the side of his

right thigh, traversed it and went into his left thigh. Immediately after the shooting he was dazed and was taken to the hospital for treatment. While Campbell did not recall making any statements to the police regarding the car or its occupants he does not deny making any such statements.

Two police officers escorted two men to the hospital for possible identification, however, Campbell was unable to identify either as the gunman. Campbell stated that he did not know Griffin prior to the shooting and as a result had no reason to fear him. Campbell was not contacted by movant's attorney but was subpoenaed by the state to testify at trial. However, when he appeared on the day of trial he was told by a unidentified employee that he was no longer needed so he left. Campbell further stated that this would

have been his testimony had he been called to testify at movant's trial.

Movant's own testimony at the evidentiary hearing contradicts that of Campbell. Movant testified that after the May 13 shooting he and his nephew were escorted by the police to the hospital where Campbell was receiving treatment. When asked what Campbell said in response to movant's presence in the hospital movant replied, "He said that we was the ones." Movant testified that he told his attorney about this statement.[1]

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[1] In its Findings of Fact and Conclusions of Law the trial court made the following finding:

> According to the Court's recollection of the testimony at the evidentiary hearing, Robert Campbell did not say that movant "was not the person who had shot him", only that he could not identify Larry

(Footnote Continued)

Trial counsel has a duty to make reasonable investigations or to make a reasonable decision that a particular investigation is unnecessary. When ineffective assistance of counsel is raised, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel and judgment.

(Footnote Continued)

> and Reginald Griffin as the ones involved in the May 13 shooting. The only testimony to support movant's allegation came from movant himself who testified that Robert Campbell said "we wasn't the ones". (Emphasis added).

This statement is contradicted by the record. However, the court went on to conclude that the actions of counsel were trial strategy and denied movant his claim for relief. The primary concern on appeal is the correctness of the result reached by the trial court not the route taken to reach it. Weber v. Knackstedt, 707 S.W.2d 800, 804 (Mo. App. 1986).

Strickland, 466 U.S. at 691; Martin v. State, 712 S.W.2d 14, 16 (Mo. App. 1986). The reasonableness of counsel's decision regarding investigation may be substantially influenced by defendant's own statements or actions. Strickland, 466 U.S. at 691.

In the case before us, the course of action pursued by counsel was clearly a matter of trial strategy. Prior to trial counsel had before him a police report which contained Campbell's description of the car movant was seen in a half hour after the shooting; a police report that put Campbell in the middle of an apparent attempt on Moss' life; and most important, the movant's statement that he was positively identified by Campbell as the gunman. Counsel concluded that the mere fact that Campbell was in close proximity to Moss at the time of the 1980 shooting would

be the most damaging aspect of his testimony. Armed with the foregoing information, all of it damaging, counsel could have reasonably concluded that interviewing Campbell would have been fruitless and possibly even harmful. Further, if Campbell's testimony were offered at trial it would have, at best, merely established that he may or may not have made the statement contained in the report.

After considering the circumstances and affording counsel due deference we conclude that the decision not to interview and call Robert Campbell to testify at trial was supported by reasonable professional judgment and was a matter of trial strategy. Movant's first point is denied.

In his second point the movant avers that the hearing court erred when it declined to find trial counsel inef-

fective for failing to offer mitigating circumstances at the penalty phase of his trial. Movant argues that "trial counsel should have recognized and submitted the most obvious mitigating circumstance which the jury could have considered in assessing punishment-the victim's implication in appellant's brother's death." Failure to present this evidence along with counsel's failure to call family members to plead for his life , according to the movant, deprived him of effective assistance of counsel.

At the evidentiary trial hearing counsel stated that there were no statutory mitigating circumstances available to him but recognized that he was free to present evidence beyond that listed in the statute. He recognized that he could have put on family members to make a plea for mercy. However, the

defense was based on alibi and defendant had maintained his innocence throughout the trial. Counsel felt that presenting such evidence would send a message to the jury that said "we have been lying to you all week, but give us a break." Counsel felt that such a maneuver would undermine the credibility that he had been trying to establish throughout the trial. Movant testified that counsel had presented him with a list of statutory mitigating circumstances and he agreed with counsel that none of the statutory circumstances applied to his situation. When asked at the evidentiary hearing what information the jury should have heard about him that may have caused the jury not to recommend death movant replied, "I don't know". Movant fails to overcome the presumption that under these circumstances,

the course of action pursued by his trial counsel might be considered sound trial strategy. Id. The finding of the hearing court is not clearly erroneous. Rule 27.26(j). Point denied.

In his third point movant argues that the hearing court erred in failing to find his trial counsel ineffective for neglecting to file any pre-trial motions related to the death-qualification of the jury. This failure, he argues, deprived him of rights guaranteed him by the Constitution. The thrust of movant's argument appears to be that a reasonably competent attorney would have made a concerted effort to "life-qualify" the jury in response to the efforts of the state to death-qualify the jury. This failure, in movant's words, "undoubtedly left appellant with an unjust conviction and death prone petit jury".

After review of the record and pertinent case law, it is clear that movant is attempting to attack the death-qualification of a jury by using a back-door approach. Movant's reasoning is flawed. The Missouri Courts have consistently held that the death-qualification of capital juries does not violate the constitutional rights of criminal defendants. State v. Roberts, 709 S.W.2d 857, 868 (Mo. banc 1986); State v. Jones, 726 S.W.2d 400, 401 (Mo. App. 1987).

One of the questions asked of each potential juror by the state in its voir dire was, in essence, this: "If you were instructed that the death penalty is an alternative within the range of punishment, do you feel that you could consider imposing it after hearing all the evidence?" Any juror who answered that question in the negative

expressed his inability to follow the instructions of the court. A defendant does not have a right to be tried by jurors who explicitly express an inability to follow the law and the instructions of the court. State v. Stokes, 638 S.W.2d 715, 722 (Mo. banc 1982). If death-qualification of a jury is constitutionally permissible, trial counsel cannot be faulted for failing to take any action to prevent such qualification. The finding of the hearing court is not clearly erroneous and accordingly movant's third point is denied.

Movant's fourth point was first raised in this appeal of movant's post conviction proceeding by way of a supplemental pro se brief filed on December 23, 1987, fifteen days before the date set for oral argument. In that point movant avers that his trial coun-

sel was ineffective in that he failed to make a timely objection to the testimony of Missouria Moss concerning the contents of phone calls she received. While this court was not supplied with a transcript of the trial, it would appear from both the record before us as well as from the facts that appear in the direct appeal that during the course of Moss' testimony she "[repeated] verbal threats she heard from unknown individuals over the telephone . . . ." Griffin, 662 S.W.2d at 859. Movant now argues that such testimony was inadmissible as hearsay testimony and that its introduction without objection was "clearly prejudicial." On direct appeal the Missouri Supreme Court found that the issue had not been

preserved for review and did not warrant plain error review. Id.[2]

We need not determine whether the action or inaction of movant's trial counsel was deficient because movant

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[2] The hearing court, in its Order and Judgment issued on February 23, 1987, stated "[o]f the thirty or more allegations set out in pleadings, many are repetitious, others are not the proper subject of a Rule 27.26 Motion [e.g., '_ _ _ the trial court: Failed to _ _ _' (b) (1) - (5) of Pro Se Motion] and those which were not addressed at the evidentiary hearing or in the subsequent memoranda filed, are deemed abandoned."

However, our review of the record before us reveals that this allegation was properly raised as an issue of ineffective assistance of counsel in Section 8 (a) (6) of movant's pro se motion 27.26 which was filed on November 16, 1984. Further, the issue was addressed at the evidentiary hearing during direct examination of trial counsel by movant's attorney. Despite the fact that no findings of fact or conclusions of law were made by the hearing court on this issue we find the record sufficient to enable us to dispose of this issue.

has failed to show how he was prejudiced. Strickland, 466 U.S. at 699. Movant's trial counsel testified at the evidentiary hearing that he had filed a motion in limine to exclude the testimony of Ms. Moss regarding the phone calls she received. Although we were not provided with a transcript of the trial it would appear from the fact that such testimony was introduced that movant's motion was denied. However, trial counsel stated at the hearing, and movant concedes in his supplemental brief, that no evidence was presented by the state to connect movant to the phone calls. The bare fact that Ms. Moss received threatening phone calls without any evidence linking movant to those calls was, at most, irrelevant and cannot be assumed to be prejudicial absent any evidence to support such a

conclusion. Point denied. The judgment of the hearing court is affirmed.

JAMES A. PUDLOWSKI, Judge

STEPHAN, Presiding Judge and KAROHL, Judge,

CONCUR.

No. 91-1782

Supreme Court, U.S.
FILED
JUL 1 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PAUL DELO,

Petitioner,

v.

LARRY GRIFFIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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QUESTIONS PRESENTED

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE EIGHTH CIRCUIT'S INTERLOCUTORY ORDER REMANDING THIS CAUSE FOR FURTHER PROCEEDINGS IN DISTRICT COURT PROPERLY RECOGNIZED THAT THE SUBSTANTIVE AND PROCEDURAL ISSUES IN THIS HABEAS CORPUS ACTION HAVE NOT BEEN FULLY FACTUALLY DEVELOPED AND ARE NOT YET RIPE FOR APPELLATE REVIEW.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE ISSUES CONTAINED IN RESPONDENT'S INITIAL HABEAS CORPUS LITIGATION BECAUSE THE ABUSE OF THE WRIT DOCTRINE AS EMBODIED IN RULE 9(b) ONLY APPLIES TO "SECOND OR SUCCESSIVE" PETITIONS.

III. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE EIGHTH CIRCUIT'S INTERLOCUTORY REMAND ORDER IS NOT INCONSISTENT WITH, BUT INSTEAD PROMOTES THE POLICIES EMBODIED IN THIS COURT'S RECENT OPINIONS IN MCCLESKEY v. ZANT AND IN RE BLODGETT.

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STATEMENT OF THE CASE

Respondent is compelled to correct and clarify petitioner's statement of the case by adding certain important facts and details omitted by petitioner. Respondent, Larry Griffin, has steadfastly maintained his innocence of the murder of Quintin Moss since he was originally charged with this offense. Mr. Griffin's conviction for capital murder rested on evidence that could clearly be characterized as weak and questionable. The only direct evidence connecting Mr. Griffin to the murder of Quintin Moss was a cross-racial photo identification of him by a man named Robert J. Fitzgerald, a multiple convicted felon who at the time of the homicide was enrolled in the federal witness protection program. (Resp. A-3-6). Fitzgerald's credibility was also suspect due to the fact that he received lenient treatment on four pending felony charges in exchange for his testimony against respondent. (Resp. A-4).

No physical evidence linked Mr. Griffin to the murder of Quintin Moss. In fact, fingerprints found on the car used in the drive-by shooting of Mr. Moss did not match the known fingerprints of Mr. Griffin. (Trial Tr. at 363-365). In addition, the jury that found Mr. Griffin guilty did not hear significant exculpatory evidence which would have refuted the state's evidence of motive. (Resp. A-79-90). Trial counsel also failed to present available evidence that Mr. Griffin is left-handed which would have cast further doubt that Mr. Griffin was the person identified by Mr. Fitzgerald as the man firing the fatal shots, in light of the fact that Fitzgerald had testified that the shooter fired the murder weapon right handed. (Resp. A-7). Due to the ineffective performance of

his trial counsel, the jury did not hear this important exculpatory evidence supporting Mr. Griffin's claim of innocence.

After conviction, Mr. Griffin's trial counsel presented no mitigating evidence to the jury and gave a short ineffective closing argument taking less than two pages to transcribe. (Trial Tr. 478-480). The jury thereafter sentenced Mr. Griffin to death. This breakdown of the adversarial system that has very possibly led to a conviction of an innocent man is even more apparent during post-conviction proceedings in this cause. The panel of the Eighth Circuit which decided to remand this case for further proceedings was presented with unrefuted evidence that previous appointed counsel was grossly incompetent and had abandoned Mr. Griffin during both state post-conviction proceedings and during the present initial federal habeas corpus litigation.

Daniel J. Gralike, who represented Mr. Griffin in both state post-conviction proceedings and in initial federal habeas proceedings performed abysmally in failing to recognize and raise valid constitutional claims readily apparent from the state Court record (Resp. A-54-67); and also failed to present any evidence or legal authority in support of claims that he had raised. (Resp. A-52-54). Gralike also filed a clearly deficient brief in the Eighth Circuit. (Resp. A-9-34, 77-78). More importantly, however, the Eighth Circuit panel was presented with uncontradicted evidence that Mr. Gralike had abandoned Mr. Griffin by taking a job with the

Missouri public defender's office in Columbia, Missouri.[1] This clear evidence of abandonment is also shown by the fact that Mr. Gralike did not file a motion for rehearing or rehearing *en banc* on Mr. Griffin's behalf, forcing Mr. Griffin to file his motion *pro se*. (Resp. A-35-46). In light of the uncontradicted evidence of Mr. Gralike's abandonment of Mr. Griffin, the Eighth Circuit panel granted rehearing and remanded the case in the interest of justice to permit Mr. Griffin a full and fair opportunity to litigate all of his claims of constitutional error in one proceeding.

It should also be noted that the Eighth Circuit's opinion complies with the dictates of In re Blodgett, 112 S. Ct. 674 (1992), by ordering the district Court to issue a final judgment on Mr. Griffin's habeas petition within 180 days in order to allow prompt appellate review of the issues in his case. In light of this 180-day time limit and the Eighth Circuit's recent opinion in Rust v. Clarke, 960 F.2d 72 (8th Cir. 1992), petitioner is clearly incorrect in asserting that the Eighth Circuit is deliberately ignoring this Court's pronouncements on finality in McCleskey v. Zant, 111 S. Ct. 1454 (1991) and Blodgett. (Pet. at 19-20).

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[1]Under Missouri law, public defenders are prohibited from otherwise engaging in the practice of law. § 600.021(2) RSMo. (1986).

ARGUMENT

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE EIGHTH CIRCUIT'S INTERLOCUTORY ORDER REMANDING THIS CAUSE FOR FURTHER PROCEEDINGS IN DISTRICT COURT PROPERLY RECOGNIZED THAT THE SUBSTANTIVE AND PROCEDURAL ISSUES IN THIS HABEAS CORPUS ACTION HAVE NOT BEEN FULLY FACTUALLY DEVELOPED AND ARE NOT YET RIPE FOR APPELLATE REVIEW.

The Eighth Circuit's remand order in this cause is not a final judgment. As a result, respondent contends that the factual and legal issues in Mr. Griffin's initial habeas action are not yet ripe for appellate review or discretionary review by this Court.

The Eighth Circuit's order implicitly recognizes that the factual and legal issues contained in this habeas corpus action have not been sufficiently developed in order to allow proper appellate review. Although this Court, unlike the Eighth Circuit, does not at this time have the benefit of the state Court record in this case, an examination of the issues raised in respondent's rehearing pleadings in the Eighth Circuit clearly show that the issues in this case need further factual development in district court. (Resp. A-35-74). Further evidence must be heard in district court not only on the merits of respondent's constitutional claims, but also to address the procedural bar issues injected and advanced by petitioner in this Court. Under established case law both in this Court and the Eighth Circuit, a petitioner is entitled to the opportunity to prove cause and prejudice to excuse abuse of the writ or procedural bar unless the Court can determine as a matter of law that the petitioner would be unable to do so. McCleskey v. Zant, 111 S. Ct. 1454, 1470, (1991). See also Miller v. Solem, 758 F.2d 144 (8th Cir. 1985).

Petitioner also argues that Coleman v. Thompson, 111 S. Ct. 2546 (1991), prevents respondent from establishing cause and prejudice due to the ineffectiveness of counsel during post-conviction proceedings. However, Coleman does not clearly foreclose petitioner from establishing cause and prejudice because many of the purported procedural defaults[2] occurred in the state post-conviction motion Court due to the failure of counsel to present evidence in support of Mr. Griffin's constitutional claims. (Resp. A-52-54). Coleman explicitly left open the question of whether the ineffectiveness of post- conviction motion counsel can establish cause where state post-conviction is the only available state court forum in which to raise certain categories of constitutional claims.[3] Id. at 2567-2568.

Missouri, as in the Virginia post-conviction laws at issue in Coleman, does not permit ineffectiveness of counsel claims to be raised on direct appeal. See State v. Wheat, 775 S.W.2d 155 (Mo. banc 1989). Instead, the first forum in which ineffectiveness

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[2]Many other purported procedural defaults occurred during trial and direct appeal where Mr. Griffin clearly had a constitutional right to counsel. Respondent has exhausted his claims by filing motions to recall the mandate (Resp. A-93-125), a viable post-conviction remedy in Missouri. See Simpson v. Camper, 927 F.2d 392 (8th Cir. 1991); and State v. Sumlin, 820 S.W.2d 487 (Mo. banc 1991). The district court must decide after remand whether these claims are subject to a valid procedural bar.

[3]There is also a conflict of interest issue that could overcome any procedural bar due to the fact Mr. Gralike represented respondent during both state post-conviction proceedings and initial federal habeas proceedings. Gralike could not and did not inject any issue of his ineffectiveness during state post-conviction proceedings as "cause" to overcome any procedural defaults.

claims can be raised is in the state post-conviction motion court. The Eighth Circuit has also recognized that in Missouri, it is still an open question under Coleman as to whether ineffective assistance of post-conviction motion counsel may constitute cause to excuse a procedural default. See Schlup v. Armontrout, 941 F.2d 631, 640, n.9 (8th Cir. 1991). In addition, at least two of Mr. Griffin's ineffective assistance of trial counsel claims would be reviewable by federal courts on the merits notwithstanding any purported procedural bar because they establish his "actual innocence" of the capital murder of Quintin Moss. See Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986).

The first of these "actual innocence" claims involves the ineffective assistance of trial counsel in failing to produce evidence that Mr. Griffin is left-handed to refute the identification testimony of Robert Fitzgerald, who stated that the person he identified as Mr. Griffin shot at the victim with his right hand. (Resp. A-7). The other claim that clearly involves the actual innocence of respondent is an ineffective assistance of trial counsel claim based upon trial counsel's failure to present existing evidence to refute the state's theory that respondent was motivated to kill Quintin Moss because he believed that Moss had previously killed his brother, Dennis Griffin. (Resp. A-79-90).

The Eighth Circuit's interlocutory remand order does not preclude petitioner from asserting any appropriate procedural defenses in district court. In fact, the Eighth Circuit's order specifically notes that respondent is free to assert any appropriate claims

and defenses in district court after remand. (See Pet. A-5). Clearly, the interlocutory remand order by the Eighth Circuit recognized that both the substantive and procedural issues in this habeas action need further development in district court. At this point, the substantive and procedural issues in this case are neither ripe for appellate review by the Eighth Circuit nor the exercise of discretionary review by this Court.

Interlocutory remand orders by courts of appeals are normally not ripe for discretionary review by this Court. This Court has recognized that, except in extraordinary cases, this Court should not grant certiorari to review interlocutory remand orders since they do not involve a final judgment determining all the issues in the case. See, Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad Co., 389 U.S. 327, 328 (1967). See also Hamilton Shoe Co. v. Wolf Brothers, 240 U.S. 251, 257-258 (1916).

The fact that the Eighth Circuit's remand order is not a final judgment is alone a sufficient ground to justify the denial of discretionary review by this Court. Id. Petitioner has not demonstrated that this is an extraordinary case that justifies this Court's departure from its long established practice of refusing to review interlocutory orders from the courts of appeals.[4] Respondent has amply demonstrated both in the Eighth Circuit and in this Court that the legal and factual issues in this habeas action

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[4]There is little doubt that this court will have another opportunity to review some or all of the issues in this case next term after a final judgment is issued in this case.

need to be developed in district Court and are therefore not ripe for review. The writ of certiorari should therefore be denied.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE ISSUES CONTAINED IN RESPONDENT'S INITIAL HABEAS CORPUS LITIGATION BECAUSE THE ABUSE OF THE WRIT DOCTRINE AS EMBODIED IN RULE 9(b) ONLY APPLIES TO "SECOND OR SUCCESSIVE" PETITIONS.

Rule 9(b) of the rules governing habeas corpus cases under 28 U.S.C. § 2254 explicitly provides:

> a second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ. (emphasis added)

The plain language of Rule 9(b) clearly indicates that its provisions are to be applied only to second or successive habeas petitions. Since this matter is before the Court on Mr. Griffin's first habeas petition, it is clear that Rule 9(b) does not apply to this litigation.

Rule 9(b) is expressly limited to second or successive habeas petitions. Therefore, abuse of the writ doctrine has not been held to apply to first habeas petitions. See Bundy v. Dugger, 850 F.2d 1402, 1406-1407 (11th Cir. 1988); and Davis v. Dugger, 829 F.2d 1513, 1518 (11th Cir. 1987).

Even assuming arguendo that abuse of the writ analysis were to apply to Mr. Griffin's initial habeas litigation, remand of this cause would nevertheless be required because it cannot be established as a matter of law that respondent cannot satisfy the cause

and prejudice standard to excuse abuse of the writ.[5] McCleskey, 111 S. Ct. 1454 at 1471. The Eighth Circuit's opinion does not prevent petitioner from asserting abuse of the writ as a defense in district court after remand. (Pet. A-5). In addition, at least two of respondent's claims of constitutional error are reviewable on their merits under the "actual innocence" exception. (See Discussion at p. 6, infra).

The Eighth Circuit panel opinion correctly recognized that any procedural bar defenses asserted by petitioner should and must be resolved in district Court because they involve factual determinations upon which no record has yet been developed. Without a sufficient factual record, even assuming arguendo that abuse of the writ applies in the context of this case, further hearings would be necessary to resolve the abuse of the writ issues. As result, the petition for writ of certiorari should be denied.

III. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE EIGHTH CIRCUIT'S INTERLOCUTORY REMAND ORDER IS NOT INCONSISTENT WITH, BUT INSTEAD PROMOTES THE POLICIES EMBODIED IN THIS COURT'S RECENT OPINIONS IN MCCLESKEY v. ZANT AND IN RE BLODGETT.

Petitioner asserts that this Court should review this case because the Eighth Circuit panel opinion undermines the policies of finality expressed by this Court in the recent cases of McCleskey v. Zant, 111 S. Ct. 1454 (1991) and In re Blodgett, 112 S. Ct. 674

[5]One of respondent's claims is an allegation that the state deliberately withheld exculpatory information involving witness Robert Fitzgerald (Resp. A-55), in violation of due process under United States v. Bagley, 473 U.S. 667 (1985). There would be cause and prejudice to excuse any abuse of the writ if respondent can establish that the state deliberately withheld material exculpatory evidence. See Amadeo v. Zant, 486 U.S. 214, 222 (1988).

(1992). However, a closer reading of those cases, when examined in light of the uncontroverted evidence that Mr. Griffin had been abandoned by his previous counsel which prevented a full and fair review of his constitutional claims in federal Court,[6] leads to the inevitable conclusion that the Eighth Circuit panel opinion is clearly consistent with the concerns of finality and justice expressed by this Court in both McCleskey and Blodgett.

The policies advanced by this Court in McCleskey are not contradicted by the Eighth Circuit's decision to remand Mr. Griffin's case so that his constitutional claims may be fully and fairly considered in a federal forum. The opinion in McCleskey examined in painstaking detail the history of the federal writ of habeas corpus. In holding that abusive petitions should be limited, this Court recognized the importance of appellate review in assuring that a habeas petitioner has a full and fair opportunity to litigate his claims in federal Court. 111 S. Ct. at 1462-1463. Moreover, this Court in McCleskey explicitly recognized the duty of habeas counsel to "conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition." Id. at 1472.

Petitioner also prominently cites In re Blodgett, 112 S. Ct. 674, in support of his position that the Eighth Circuit opinion undermines principles of finality in habeas litigation. This

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[6]Petitioner does not argue that courts of appeal lack the inherent authority to grant rehearing and/or remand a case when confronted with uncontradicted evidence of attorney incompetence or abandonment of a litigant by counsel. See Ziegler v. Wainwright, 805 F.2d 1422, 1425-26 (11th Cir. 1986).

Court's opinion in Blodgett in fact provides support for the Eighth Circuit's opinion remanding this cause for one full and fair hearing in federal court on Mr. Griffin's constitutional claims. The Eighth Circuit's order remanding this case will serve to avoid the acknowledged problem of piecemeal litigation and multiple filings in federal habeas actions. 112 S. Ct. at 676. Moreover, this Court specifically stated in Blodgett that:

> In a capital case, the grant of a stay of execution directed to a state by a federal Court imposing on that Court the concomitant duty to take all steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all of the issues presented in the case.

Id. at 676-677. (emphasis added)

This language from Blodgett clearly reflects the tension between finality in the resolution of capital habeas petitions and the federal court's duty to permit petitioners a full and fair opportunity to litigate their claims of constitutional error. This language from Blodgett recognizes that the interest of finality must in rare cases yield to the interest of justice.[7] In light of the uncontradicted evidence that due to the abandonment of Mr. Griffin by his previous appointed counsel he never received full and fair consideration of his constitutional claims in federal

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[7]Petitioner also argues without citing any authority that the Eighth Circuit opinion creates a new rule regarding remand procedures in habeas cases. (Pet. at 22). This argument clearly lacks merit. Walker v. Lockhart, 726 F.2d 1238, 1265 (8th Cir. 1984), in which the court remanded a habeas case in the interest of justice, was decided prior to the time respondent's conviction became final for purposes of "retroactivity" analysis.

court, this is clearly a case where the interest of justice outweighs any interest in finality.

In contrast to the petitioner's position, the Eighth Circuit panel opinion recognized Blodgett's dictate that habeas cases should be decided promptly by ordering the district court to issue a final ruling on Mr. Griffin's claims within 180 days and thereafter certify those findings to the Eighth Circuit to allow expeditious appellate review. It is the petitioner who is in fact frustrating the policies of Blodgett by injecting procedural issues in this Court and previously in the Eighth Circuit without the proper factual record to allow either court to adequately review those issues. The Eighth Circuit properly applied the concerns of finality and the interest of justice to the unique facts[8] of this case. The Eighth Circuit's order in no way violates the teachings of either McCleskey or Blodgett. The petition for writ of certiorari should be denied.

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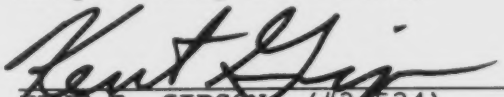
[8]Petitioner has argued without citing any authority that the Eighth Circuit's opinion would create an "automatic remand" rule in all habeas actions where a petitioner can come up with a new claim. (Pet. at 25). Petitioner also argues that the Eighth Circuit opinion establishes a different standard for capital cases in violation of Smith v. Murray, 477 U.S. 527, 538 (1986). (Pet. at 30). Neither argument is persuasive. The Eighth Circuit has remanded a handful of habeas actions in the interest of justice in both capital and noncapital cases. See Walker v. Lockhart, 726 F.2d 1238 (8th Cir. 1984); Simmons v. Lockhart, 856 F.2d 1144 (8th Cir. 1988); and Williams v. Lockhart, 862 F.2d 155 (8th Cir. 1988). These cases have not created a flood of remands or an automatic remand rule in the Eighth Circuit. This Court should not be duped by petitioner's unsupported alarmist rhetoric.

CONCLUSION

The record in this case clearly establishes that the procedural bar issues which petitioner attempts to inject into this litigation to justify the Court's discretionary review have not been factually developed and are not yet ripe for appellate review. Moreover, the Eighth Circuit's order is not a final judgment. This is not an extraordinary case that would justify a departure from this Court's usual practice of refusing to review interlocutory decisions of the courts of appeals. In addition, since this case involves Mr. Griffin's first habeas petition, abuse of the writ does not apply to these proceedings. Finally, the Eighth Circuit's panel opinion actually promotes the interests of justice, finality and the avoidance of piecemeal litigation that have been emphasized in this Court's recent habeas corpus decisions. For all these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,



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